80-308

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MICHAEL RODAK, JR., CLERK

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ORTHO PHARMACEUTICAL CORPORATION,
Petitioner,

v.

SONDRA L. McKENNA and
JAMES R. McKENNA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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August 1, 1980

QUESTION PRESENTED

1. Under the Rules of Decision Act, 28 U.S.C. § 1652, should the United States Court of Appeals for the Third Circuit, in applying state law in a diversity case, ignore the pertinent rulings of the state intermediate appellate courts merely because the highest state court had not, to quote from the opinion below, "recently spoken to the precise question at issue in a particular setting" (a8)?

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IN THE

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October Term, 1980

ORTHO PHARMACEUTICAL CORPORATION,

Petitioner,

-v-

SONDRA L. McKENNA and
JAMES R. McKENNA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Ortho Pharmaceutical Corporation ("Ortho") requests that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 18, 1980, and, denying Ortho's petition for rehearing, on June 2, 1980.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals in this matter dated March 18, 1980, are reproduced in the Appendix hereto beginning at page a1. The Court of Appeals filed a supplemental opinion on June 17, 1980, also with a dissent, denying Ortho's motion for rehearing which is reproduced in the Appendix beginning at page a28. Neither opinion has as yet been published in the Federal Reporter.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was originally entered on March 18, 1980. The Third Circuit denied a timely petition for rehearing on June 2, 1980. This petition for a writ of certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Under the Rules of Decision Act, 28 U.S.C. § 1652, should the United States Court of Appeals for the Third Circuit, in applying state law in a diversity case, ignore the pertinent rulings of the state intermediate appellate courts merely because the highest state court had not, to quote from the opinion below, "recently spoken to the precise question at issue in a particular setting" (a8)?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1652: State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Ohio Revised Code § 2305.10:

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

STATEMENT OF THE CASE

This is a product liability action by the McKennas against Ortho in which they allege that Mrs. McKenna's ingestion of Ortho's oral contraceptive caused her to suffer injuries: first hypertension in 1969 and then a stroke in 1972. The action was started in 1974 in Pennsylvania state court, although the cause of action arose in Ohio, and was removed by Ortho pursuant to 28 U.S.C. § 1441(b) to federal district court in Pittsburgh.

At the conclusion of the evidence, which consumed nearly a month, the District Court granted Ortho's motion for a directed verdict on the ground that Mrs. McKenna's claim, and her husband's derivative claim, were barred by the two year Ohio statute of limitations which the District Court, sitting in Pennsylvania, was bound to apply under Pennsylvania conflict of law rules. The District Court based its conclusion on the finding that under Ohio law Mrs. McKenna's cause of action arose in 1969, the date of first manifestation of injury attributed to Ortho's drug.

Over a vigorous dissent, the Third Circuit reversed, agreeing that Ohio law governed but finding that the Ohio Supreme Court would, if presented with the opportunity today, adopt a "discovery rule" which would toll the running of Ohio's statute until Mrs. McKenna knew or reasonably should have discovered that she had been injured by Ortho's product, thereby making her claim timely.

The basis of the Third Circuit's ruling was that the Ohio Supreme Court would today apply the discovery rule to a claim like the McKennas' even though that court had expressly limited the discovery rule to cases concerning foreign objects left in the body after surgery in *Melnyk* v. *Cleveland Clinic,* 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972).

In so ruling, the majority ignored the recent, consistent body of Ohio intermediate appellate decisions which have interpreted *Melnyk* as precluding extension of the discovery rule to cases not involving such "foreign objects" and which

form, in the words of the dissent, "an unbroken line of cases from Ohio which rejects the discovery rule announced by the majority" (a33).* The majority below, upon determining that no recent Ohio Supreme Court decision had "spoken to the precise question at issue in a particular setting" (a8), in effect overruled these uniform and clear Ohio state and local federal rulings by declaring itself free to forecast Ohio law " 'after giving proper regard to relevant rulings of other courts of the state' " (a8).

The lack of wisdom in indulging in such speculation was soon vividly illustrated. Unbeknownst to the Third

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* The cases in question included the following published decisions: *Simmons* v. *Riverside Methodist Hospital,* 44 Ohio App. 2d 146, 336 N.E.2d 460 (Franklin Co. 1975), *motion to certify overruled,* (Sup. Ct. 1976); *Woodgeard* v. *Miami Valley Hospital Society of Dayton,* 47 Ohio Misc. 43, 354 N.E.2d 720 (Common Pleas, Montgomery Co.), *aff'd mem.* No. CA-4772 (Ct. of App., Montgomery Co. 1975); and the following unpublished decisions which can be authoritatively cited in Ohio, *e.g.,* Ohio Local Court Rule 19, Eighth Appellate Judicial District, authorizing citation to unpublished Ohio opinions: *Saultz* v. *Funk,* No. 38328 (Ct. of App. Cuyahoga Co. 1979) (Included in Appendix hereto at a34); *Spangler* v. *Southern Mills,* No. 77AP-586 (Ct. of App., Franklin Co.), *motion to certify overruled,* No. 78-399 (Sup. Ct. 1978) (Included in Appendix hereto at a54); *Kottler* v. *University Hospital of Cleveland,* No. 37404 (Ct. of App., Cuyahoga Co. 1978)(Included in Appendix hereto at a60).

An equally consistent body of federal decisions from Ohio had reached the same conclusion as to the limitations on the discovery rule in Ohio, *Clutter* v. *Johns-Manville Sales Corp.,* No. 78-8424 (6th Cir. 1979), denying permission under 28 U.S.C. § 1293(b) to appeal from District Court decision C78-229 (N.D. Ohio 1978) (Included in Appendix hereto at a68, a69); *Shrewsbury* v. *Smith,* 511 F.2d 1058 (6th Cir. 1975); *Dwiggins* v. *Combustion Engineering,* No. C78-196 (N.D. Ohio 1978); including cases considering causes of action for injury from oral contraceptives, *Gillan* v. *Searle Laboratories,* No. C-2-77-865 (S.D. Ohio 1978); *Porter* v. *Parke-Davis Pharmaceutical Co.,* No. C76-153 (S.D. Ohio 1976); *Weber* v. *Ortho Pharmaceuticals, Inc.,* No. C74-4Y (N.D. Ohio 1974).

In bypassing these interpretations of state law by federal courts in Ohio, the Third Circuit ignored the principle that special weight is to be accorded rulings on local law by local federal judges. *E.g., Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 204 (1956); *MacGregor* v. *State Mutual Life Assur. Co.,* 315 U.S. 280, 281 (1942).

Circuit, five days before it filed its opinion in this case the Governor of Ohio signed into law an amendment to Ohio Rev. Code § 2305.10, the applicable statute of limitation, providing for a discovery rule but limited solely to injuries due to asbestos and chromium poisoning.

Ortho petitioned for rehearing on the basis that the Ohio legislature, with full awareness of the uniform rulings of the state appellate and federal courts limiting the discovery rule to foreign object cases, elected to adopt the discovery rule for only two classes of injuries—asbestos and chromium—and that the Ohio courts would interpret the amendment to preclude application of a discovery rule to injuries not caused by those two substances.

The rehearing petition was also based on the ground that the Third Circuit's disregard of the relevant body of Ohio law as set forth in the uniform state intermediate appellate decisions violated the principle of deference to such rulings required by *West* v. *American Telephone and Telegraph Co.,* 311 U.S. 223 (1940). In a supplemental decision, again over a vigorous dissent, the court below denied the petition.

The untenable position of the Third Circuit in ignoring recent decisions of the Ohio Courts of Appeal was graphically exposed in its opinion denying the petition for rehearing (a28 to a33).

The Third Circuit's original ruling was bottomed on the rationale that "[l]egislative inaction 'is a weak reed upon which to lean in determining legislative intent' " (a16). Its reasoning was that "the sole justification" for the Ohio Supreme Court's refusal to adopt a discovery rule in the *Wyler* and *Amer* cases* "was that such action should be left to the legislature" (a14-a15) and that this justification had been abandoned by the Ohio Supreme Court in *Melnyk (a19).* It then went on to explain that "the [Ohio] legislature left unresolved when a cause of action arises and when the

* *Amer* v. *Akron City Hospital,* 47 Ohio St. 2d 85, 351 N.E.2d 479 (1976); *Wyler* v. *Tripi,* 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971). The dissenting opinion below analyzes the holdings of these two cases in detail (a20-a25).

statute commences to run" (a16-a17), and concluded that it was therefore free to adopt the discovery rule "at least in the absence of an expression by the legislature prohibiting such an adoption" (a17).

The March 13, 1980 revision by the Ohio Legislature providing for a discovery rule in only two limited classes of injury, poisoning from chromium and asbestos, destroyed this rationale for the original opinion by the Third Circuit. As noted by the dissent (a21-a22), the Legislature prior to its limited adoption of a discovery rule had consistently rejected proposed legislation providing for a general discovery rule. Now faced with clear and indisputably "recent" legislative action in this area, the Third Circuit in its supplemental opinion on the petition for rehearing proceeded to rule that such legislative action did not "preclude judicial adoption of the discovery rule in appropriate circumstances" (a30), and thus adhered to its prior refusal to apply Ohio law, both judicial and legislative.

The Third Circuit then resorted to erecting fantasy excuses as alternative explanations for its *de facto* repeal of the Rules of Decision Act. Thus it gave the following explanation for its adhering to its original ruling (a30):

> Adoption of the contrary construction would abrogate [the Ohio Supreme Court's] well-established principle, expressly reaffirmed in *Wyler* v. *Tripi,* 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971), that a cause of action for medical malpractice arises, at the latest, when the physician-patient relationship terminates. We believe the Ohio Supreme Court would hold that if the legislature had intended, by its passage of this amendment, not merely to extend greater protection to victims of asbestos and chromium poisoning but at the same time to deprive victims of medical malpractice of the protection they currently enjoy under the Ohio Supreme Court's decisional law, it would have done so expressly and not by implication.

Limitations for malpractice actions, however, are not governed by the statute at issue, Ohio Rev. Code § 2305.10, but rather Ohio Rev. Code § 2305.11. Moreover, apart from the exception made for the foreign objects cases, Ohio cases have uniformly refused to apply the discovery rule to malpractice cases. *E.g., Saultz* v. *Funk, supra,* printed at Appendix a34. Application in this case of the statute of limitations accrual date uniformly and consistently applied by the local Ohio courts cannot possibly "deprive victims of medical malpractice of the protection they currently enjoy under the Ohio Supreme Court decisional law" (a30).

Finally, in its opinion denying the petition for rehearing, the Third Circuit explains that the Ohio Legislature in its 1980 amendment only dealt with the date of *accrual* of a cause of action and not the question of *tolling.* The 1980 amendment, however, was enacted in response to Ohio state and federal decisions refusing to apply the foreign objects *tolling* exception of *Melnyk* v. *Cleveland Clinic, supra,* to asbestosis cases.* As pointed out in the dissenting opinion to the denial of the petition of rehearing, "the issue of 'when' a statute starts to run and whether it is 'tolled' is simply a semantic one" (a32). Moreover, the Ohio cases in fact discuss application of the discovery rule in terms of "tolling" not "accrual,"** and these cases have uniformly refused to apply the discovery rule in absence of specific legislative intent mandating its application.

Thus the opinion of the Third Circuit on the petition for rehearing is not only illogical but in flat derogation of the established Ohio decisions, including recent ones of the Supreme Court, whose holdings are either misstated or ignored.

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* *E.g., Shrewsbury* v. *Smith, supra; Clutter* v. *Johns-Manville Sales Corp., supra; Spangler* v. *Southern Mills, Inc., supra.*

** *See e.g. Clutter* v. *Johns-Manville Sales Corp., supra (a68); Saultz* v. *Funk, supra (a34); Spangler* v. *Southern Mills, supra (a54).*

REASON FOR GRANTING THE WRIT

This Court should grant the Writ to resolve the conflict between the Third and the other Circuits over the proper regard to be paid to state intermediate appellate decisions in ascertaining state law in diversity cases

The Third Circuit declared itself free to forecast Ohio law because Ohio's highest court had not "recently spoken to the precise question at issue in a particular setting" (a8). In the absence of a recent definitive Ohio Supreme Court pronouncement, the Third Circuit described the forecasting process as finding the state law " 'after giving 'proper regard' to relevant rulings of other courts of the state' " (a8). It then proceeded to ignore the large, directly relevant body of Ohio intermediate appellate court decisions* and arrogated the right to (a11):

> [C]onsider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.

In other words, the Third Circuit rid itself of the requirements of the Rules of Decision Act by not respecting state intermediate appellate court decisions. If this ruling is allowed to stand, it will open a gap in the state-federal uniformity principles of *Erie* through which will flow numerous diversity plaintiffs and defendants seeking escape from unfavorable state law. The immediate impact of the

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* In a footnote the majority stated that it was "not persuaded that the lower state and federal court decisions relied on by defendant ... specifically address or definitively resolve the question at issue here" (a11). But those cases address and reject the very rationale employed by the Third Circuit in this case: that the *Melnyk* decision permits extension of the discovery rule to circumstances other than foreign objects left in the body after surgery. Moreover, under *West* v. *American Telephone and Telegraph Co., supra,* those decisions "resolve" the question at issue absent persuasive data to the contrary.

Third Circuit's ruling in this case puts the point in sharp focus. The only forums in the country applying a general discovery rule to claims governed by the Ohio statute of limitations are federal courts within the Third Circuit. It is difficult to conceive of a more forceful impetus for federal court forum shopping by Ohio plaintiffs.*

Federal courts are required to follow state intermediate appellate decisions in diversity cases unless they are convinced by persuasive evidence that the state's highest court would rule otherwise. This has been the standard since it was established in four cases decided by this Court in the 1939 Term.** *West* v. *American Telephone and Telegraph Co.*, 311 U.S. 223 (1940) (which concerned the same intermediate appellate courts involved here: the Ohio Courts of Appeal), is directly on point and distills the teaching of those cases as follows (311 U.S. at 236-7):

> A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it

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* In view of the tremendous burdens imposed on the federal courts by diversity jurisdiction, the impetus for federal court forum shopping from the decision below is particularly unwelcome. See, *e.g.*, Burger, *The State of the Federal Judiciary 1979*, 65 ABAJ 358, 362 (March 1979); Burger, *Has the Time Come?*, 55 F.R.D. 119, 120 (1972).

** *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169 (1940); *Six Companies of California* v. *Joint Highway District*, 311 U.S. 180 (1940); *West* v. *American Telephone and Telegraph Co.*, 311 U.S. 223 (1940); *Stoner* v. *New York Life Insurance Co.*, 311 U.S. 464 (1940); *See also: Russell* v. *Todd*, 309 U.S. 280, 293 (1940), where the Court accepted the interpretation of a New York statute of limitations arrived at by a New York intermediate appellate court "[i]n the absence of a definitive ruling by the highest court of the state. . . ."

thinks the rule is unsound in principle or that another is preferable.

* * *

> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

The other circuits honor this principle of deference to state intermediate appellate court decisions* and, as recently

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* *E.g., Davis* v. *Piper Aircraft Corporation,* 615 F.2d 606, 615 (4th Cir. 1980) ("The decisions of these intermediate state courts of record are binding on federal courts sitting in diversity jurisdiction."); *Baily* v. *Southern Pacific Transportation Co.,* 613 F.2d 1385, 1388 (5th Cir. 1980) ("Intermediate state court decisions are also to be followed in the absence of a decision from the highest court, unless this Court is convinced that the highest court would decide otherwise."); *Allen* v. *A. G. Edwards & Sons, Inc.,* 606 F.2d 84, 87 (5th Cir. 1979); *Feminist Women's Health Center* v. *Mohammed,* 586 F.2d 530, 552 (5th Cir. 1978), *cert. denied,* 100 S. Ct. 262 (1979); *Community National Bank* v. *Fidelity Deposit Co.,* 563 F. 2d 1319, 1321 n.1 (9th Cir. 1977) ("In determining that law, '[d]ecisions of the California Courts of Appeal are to be followed by a federal court where the Supreme Court of California has not spoken on the question in the absence of convincing evidence that the highest court of the state would decide differently' " [citing *Klingbiel* v. *Lockheed Aircraft Corp.,* 494 F.2d 345, 346 n.2 (9th Cir. 1974)]); *Garris* v. *Schwartz,* 551 F.2d 156, 158 (7th Cir. 1977) ("We are not convinced that the Illinois Supreme Court would reject the rule of law as announced and applied by the appellate court."); *Mondavi* v. *Long Island Jewish Medical Center,* 501 F.2d 1065, 1074 (2d Cir. 1974) ("While federal courts no longer regard themselves as absolutely bound even by an apparently consistent body of decisions by intermediate state appellate courts if there is reason to believe the highest court of the state would disagree . . . here we find no basis for such a belief."); *Simpson* v. *Jefferson Standard Life Insurance Co.,* 465 F.2d 1320, 1323 (6th Cir. 1972) ("decisions of intermediate state courts must be followed by the federal court unless there is reason to believe they would not be followed by that state's highest court"); *Clay* v. *Sun River Mining Co.,* 302 F.2d 599, 602 (10th Cir. 1962) ("An intermediate state court . . . in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.").

as 1972, this Court reaffirmed this long-standing rule in *Gooding* v. *Wilson,* 405 U.S. 518, 525-6 n.3 (1972):

> We were informed in oral argument that the Court of Appeals of Georgia is a court of statewide jurisdiction, the decisions of which are binding upon all trial courts in the absence of a conflicting decision of the Supreme Court of Georgia. Federal courts therefore follow these holdings as to Georgia law. *Fidelity Union Trust Co.* v. *Field,* 311 U.S. 169 (1940); *Bernhardt* v. *Polygraphic Co. of America,* 350 U.S. 198, 205 (1956).

Under the decision below, however, state intermediate appellate decisions are just additional features of the state's jurisprudential landscape to be examined by the federal court in diversity cases from the assumed vantage point of the state's highest court.* In the view of the Third Circuit, such decisions may be ignored without any showing of convincing and persuasive data that they would not be followed by the state's highest court.**

The Third Circuit purports to derive its authority to override state intermediate appellate decisions from *Commissioner* v. *Estate of Bosch,* 387 U.S. 456 (1967). There the Court

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* The decision below is not the first occasion on which the Third Circuit has minimized the importance of state intermediate appellate decisions, *i.e., Adams* v. *Cuyler,* 592 F.2d 720, 725 n.5 (3d Cir. 1979), *cert. granted,* 100 S. Ct. 1011 (1980), ("Federal courts are not bound to, but may consider the pronouncements of state intermediate appellate courts as an indication of how the state's highest court would rule.").

** *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 205 (1956), suggests what must be shown, at minimum, before a pronouncement of state law by a state tribunal may be rejected by a federal court. In adhering to the 1910 ruling of the Vermont Supreme Court, this Court stated:

> [T]here appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule.

Here the court below did not even purport to cite any "confusion," "dicta, doubts or ambiguities" casting a shadow over the long line of Ohio intermediate appellate decisions rejecting extension of the discovery rule.

ruled that, when application of a federal statute depends on an issue of state law, a federal court should defer to the ruling of the highest court of the state on that issue, but that it was not bound by lower court rulings (387 U.S. at 465):

> If there be no decision by that [highest state] court then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.

But there is nothing in *Bosch,* which involved a federal estate tax controversy, to indicate an intent to depart from the rule in diversity cases that state intermediate appellate court decisions are to be followed in the absence of compelling evidence that they would be rejected by the state's highest court.* This Court in *Gooding* v. *Wilson,* 405 U.S. 518, 525-6 n.3 (1972), citing *Fidelity Union Trust Co.* v. *Field, supra,* held that rulings of state intermediate appellate courts were to be followed in diversity cases.

By taking the *Bosch* test, rather than the test stated in *West* v. *American Telegraph and Telephone Co., supra,* as its standard for finding state law in diversity cases, the Third Circuit has invited every plaintiff and defendant who is faced with unfavorable state law to seek the diversity jurisdiction of the federal courts. Departure from the *West* requirement that federal courts follow state intermediate appellate decisions absent convincing evidence that they

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* Curiously, the Third Circuit once recognized, in an opinion ignored by subsequent Third Circuit decisions, the restrictions inherent in the *Bosch* ruling. Thus, in *Springfield St. Bank* v. *National St. Bank of Elizabeth,* 459 F.2d 712, 718 (3d Cir. 1972), the court stated the following concerning the *Bosch* decision:

> That case involved federal estate tax liability and presented a federal question which makes it wholly distinguishable from the present case. It is well settled that where, as here, state law governs, a federal court may not decline to accept a rule announced by a court of intermediate appeal deciding a state question.

would be rejected by the state's highest court promises erosion of the *Erie* uniformity principle and an unwholesome impetus to federal forum shopping by parties with state claims.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinions of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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August 1, 1980

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2567

SONDRA L. McKENNA and
JAMES R. McKENNA, *Appellants*

v.

ORTHO PHARMACEUTICAL CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 74-0808

Argued September 5, 1979

Reassigned January 2, 1980

Before: ADAMS, HUNTER and HIGGINBOTHAM,
Circuit Judges

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OPINION OF THE COURT

ADAMS, *Circuit Judge*.

After trial, but prior to the presentation of the case to the jury, the district court in this diversity case granted defendants' motion for a directed verdict on the ground that Ohio law barred recovery. Because we are persuaded by a careful review of the Ohio decisional law, as well as other relevant sources, that the Supreme Court of Ohio would not construe its statute of limitations so as to preclude recovery in this case, we reverse.

I.

James and Sondra McKenna brought this suit for negligence, misrepresentation, and products liability against Ortho Pharmaceutical Corporation (Ortho). The plaintiffs charged that Mrs. McKenna suffered severe personal injury and permanent disability as a result of ingesting Ortho-Novum, an oral contraceptive manufactured and marketed by Ortho. Following the birth of the McKennas' second child, Mrs. McKenna began using Ortho-Novum in January 1965, after receiving assurances both from Ortho's published brochure and from her personal physician, that the drug was safe and posed no serious risks. In 1967, Mrs. McKenna developed severe headaches and also experienced two attacks of transient ischemia. While hospitalized in 1969 for a stomach ailment involving vessel wall damage, Mrs. McKenna was told that she had high blood pressure, that was characterized as hypertension. In June 1969, Mrs. McKenna ceased using the oral contraceptives. Three years later, in March 1972, she suffered a catastrophic cerebrovascular stroke that left her severely and permanently paralyzed.[1]

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1. The complaint alleged that as a direct result of her use of Ortho-Novum, Mrs. McKenna suffered the following permanent in-

One year and nine months thereafter, in November 1973, the McKennas commenced this action in a Pennsylvania state court by a praecipe for a writ of trespass.[2] On Ortho's motion, the suit was removed to the federal district court in Pittsburgh, where it was ultimately tried. The plaintiffs claimed that Mrs. McKenna's injuries were caused by her ingestion of Ortho-Novum; that Mrs. McKenna relied on Ortho's false assurances about the product's safety in deciding to use Ortho-Novum; that Ortho knew or should have known that these statements were false; and that Ortho-Novum posed a risk of serious harm to its users.

Prior to trial, the district court denied Ortho's motion for summary judgment on the ground that a genuine issue of material fact existed as to whether the McKennas knew, or reasonably should have known, more than two years prior to the commencement of the suit, that Mrs. McKenna's injuries resulted from the ingestion of Ortho-Novum. During the four weeks of jury trial, the McKennas introduced expert witnesses who testified that the cerebrovascular stroke was the ultimate result of either vessel-wall damage or high blood pressure, and that both of these conditions, as well as the headaches and transient ischemia attacks, were caused by Mrs. McKenna's ingestion of Ortho-Novum. At the close of trial, but prior to submission of the case to the jury, the district court granted Ortho's motion for a directed verdict on the ground that the action was barred under Ohio's statute of limitations. The district court concluded that the Ohio statute began to run, at the latest, in 1969 when Mrs. McKenna developed high blood

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juries: paralysis of both legs and arms; bilateral facial paralysis; double vision; impairment of speech; impairment of hearing; internal injuries; shock and injury to her nervous system.

2. The district court noted that inasmuch as the plaintiffs' counsel is a Pittsburgh attorney, "it was natural" that suit was brought in Pennsylvania.

pressure, and that the cause of action was accordingly barred because it was filed more than two years after that time. It is this conclusion that we review here.

II.

Although Pennsylvania courts ordinarily apply the statute of limitations of the forum state,[3] the Pennsylvania "borrowing statute" in effect when the case was tried provided a statutory exception to this rule. It declared:

> When a cause of action has been fully barred by the law of the state in which it arose, such bar shall be a complete defense to an action thereon in any of the courts of this Commonwealth.[4]

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3. Under the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), a federal court exercising diversity jurisdiction must apply state rather than federal decisional law to questions of a "substantive" character. In order to determine which state's law applies, a federal court must ascertain the substantive law that would be applied to the question by a court of the state in which it is located, Klaxon Co. v. Stanton Elec. Mfg. Co., 313 U.S. 487 (1943), in this case Pennsylvania. Inasmuch as all of the significant events pertinent to this action occurred in Ohio, it is not disputed that the cause of action arose in Ohio and that under Pennsylvania's conflict of law rules, *see* Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964), the substantive law of Ohio governs this action.

4. Pa. Stat. Ann. tit. 12, § 39 (repealed 1978).

This provision was replaced by a similar provision which provides that:

> (b) General rule — The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim.

42 Pa. Cons. Stat. Ann. §5521 (eff. June 27, 1978).

Section 39 remains determinative in this action, because of a savings clause which provides:

> No cause of action fully barred prior to the effective date of this Act shall be revised by reason of the enactment of this Act.

The district court, in granting Ortho's motion for a directed verdict, reasoned that the Pennsylvania statute borrowed not only Ohio's two-year limitations period, but also Ohio's law governing the determination when the cause of action arises. In their appeal, the McKennas contend that this was error; they argue that even though the Pennsylvania statute "borrows" the law of Ohio regarding the length of the applicable limitations period, the question when that limitations period begins to run must be determined not by Ohio but by Pennsylvania law.

The McKennas premise their argument on this Court's prior decision in *Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Company*.[5] In *Mack Trucks*, we were asked to decide when an action for indemnity arose, for the purpose of determining whether the Pennsylvania "borrowing statute" was applicable to that action. Noting the "familiar rule" that a statute of limitations "begins to run when the cause of action arises, as determined by the occurrence of the final significant event necessary to make the claim suable," we held that a "cause arises *where* as well as *when* the final significant event that is essential to a suable claim occurs."[6] Because the final significant event essential to the action for indemnity happened in Florida, we concluded that Florida's statute of limitations applied.

Mack Trucks' application of the Pennsylvania "borrowing statute," the McKennas claim, depended upon the ascertainment of where the cause of action arose, which in turn was based on the prior determination of when it accrued. In support of this interpretation, the

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Act of July 9, 1976, P.L. 586, No. 142, §25(b), *reprinted in* 42 Pa. Cons. Stat. Ann. §5521 note.

5. 372 F.2d 18 (3d Cir. 1966).

6. 372 F.2d at 20.

McKennas rely on *Prince v. Trustees of the University of Pennsylvania*,[7] which held, on the basis of *Mack Trucks*, that the "borrowing statute" applies "only upon satisfaction of two contingencies: (1) the cause of action must arise in another state; and (2) the cause of action must be totally barred by the law of that state. Under the *Mack Truck* analysis," the district court concluded, "satisfaction of the first contingency is determined by finding where the cause of action arose, and the determination is to be governed by Pennsylvania law."[8]

The crux of the justification offered for this construction of *Mack Trucks* is the assertion that we determined when the cause of action arose in that case by references to Pennsylvania law. But, as the most recent decision addressing this issue points out, "*Mack Trucks* relied not only on Pennsylvania cases but also on cases from other jurisdictions."[9] Nor was there any suggestion in *Mack Trucks* that Florida would have commenced the running of the statute of limitations at a time different from when Pennsylvania would have. Inasmuch as *Mack Trucks* did not even discuss this issue, we do not find that decision controlling here.

We are persuaded, rather, that the apparent purpose of the Pennsylvania "borrowing statute" requires us to look to the law of the state where the cause of action arose to determine not only the prescribed period of limitations but also the point at which the statute begins to run. By its terms, the "borrowing statute" bars a plaintiff from suing in Pennsylvania "when [the] cause of action has been fully barred by the laws of the state . . . in which it arose . . . ." In our view, the essential question posed under the "borrowing statute" is whether the action in question is precluded by the laws of the state in

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7. 282 F. Supp. 832 (E.D. Pa. 1968).

8. 288 F. Supp. at 840.

9. Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp, 453 F. Supp. 527, 532 (W.D. Pa. 1978).

which it accrued, and the answer to that question must be based on the law of the state in which the claim arose as well. To do otherwise might well revive an action which is "fully barred by the laws" of another state. Accordingly, because the McKennas' cause of action arose in Ohio, we must look to Ohio law to determine when Ohio's statute of limitations commenced to run. And the question for decision, then, is whether Ohio's statute of limitations commenced to run prior to the date Mrs. McKenna knew, or reasonably should have discovered, that her injuries were caused by Ortho-Novum.[10]

III.

Given that Ohio law governs the question for decision, the task remains to determine what the pertinent Ohio law is and then to apply it to this controversy. The question of how a federal court is to ascertain and apply state decisional law to a particular case has provoked considerable comment from courts and commentators alike.[11] As some have noted, the concept that a federal

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10. The Ohio statute of limitations applicable to Sondra McKenna's claim is Ohio Rev. Code Ann. §2305.10 (Page 1954), which provides:

> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

The pertinent statute for James McKenna's derivative claim is Ohio Rev. Code Ann. §2305.09 (Page 1954), which provides in part:

> An action for any of the following causes shall be brought within four years after the cause thereof accrued:
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> (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in [other] sections . . . of the Revised Code.

11. *See, e.g.*, Commissioner v. Estate of Bosch, 387 U.S. 456 (1967); Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1955); Becker v. Interstate Properties, 569 F.2d 1203 (1977); C. Wright, *Law of Federal Courts*, §158, at 267-71 (3d ed. 1976); 1A. *Moore's Federal Practice*, para. 0.309, 3323-3330 (2d ed.) and *id.* 73-74 (1978-79 Supp.); Kurland, *Mr. Justice Frankfurter, The Su-*

court must determine state law is somewhat misleading inasmuch as it implies the existence of a readily accessible and easily understood body of state law.[12] On the contrary, the law of a state is frequently "dynamic rather than static,"[13] and consists of a working body of rules, which find expression in a number of sources. It is this working body of rules to which a federal court must look in order to ascertain the state law that governs in a particular case.

In those few instances in which the highest state court has recently spoken to the precise question at issue in a particular setting, the duty of the federal court to determine and apply state law is easily met. After all, "[t]he State's highest court is the best authority on its own law."[14] The problem of ascertainment arises when, as here, the highest state court has not yet authoritatively addressed the critical issue. Recent opinions of this Court make clear that our disposition of such cases must be governed by a prediction of how the state's highest court would decide were it confronted with the problem.[15] Although some have characterized this assign-

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NOTE 11 — *(Continued)*
preme Court and the Erie Doctrine in Diversity Cases, 67 Yale L. J. 187 (1957); Note, *Federal Interpretation of State Law — An Argument for Expanded Scope of Inquiry*, 53 Minn. L. Rev. 806 (1969).

12. *See, e.g.*, Note, *Federal Interpretation of State Law — An Argument for Expanded Scope of Inquiry*, 53 Minn. L. Rev. 806, 811 (1969).

13. *Id.*

14. Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1965). "If there be no decision by that Court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the state." *Id.* The *Erie* Court expressly intended that federal courts were to be governed by the law of each state whether it "be declared by its legislature or by its highest court in a decision." 304 U.S. 64, 78 (1938).

15. *E.g.*, Becker v. Interstate Properties, 569 F.2d 1203, 1205 (3d Cir. 1977) ("Inasmuch as no New Jersey cases are squarely on point, it is important to make clear that our disposition of this case must be governed by a prediction of what a New Jersey court would

ment as speculative or crystal-ball gazing, nonetheless it is a task which we may not decline.

An accurate forecast of Ohio's law, as it would be expressed by its highest court, requires an examination of all relevant sources of that state's law in order to isolate those factors that would inform its decision. The primary source that must be analyzed, of course, is the decisional law of the Ohio Supreme Court. In the absence of authority directly on point, decisions by that court in analogous cases provide useful indications of the court's probable disposition of a particular question of law. It is important to note, however, that our prediction "cannot be the product of a mere recitation of previously decided cases."[16] In determining state law, a federal tribunal should be careful to avoid the "danger" of giving "a state court decision a more binding effect than would a court of that state under similar circumstances."[17] Rather, relevant state precedents must be

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do if confronted with the facts before us."). Huddell v. Levin, 537 F.2d 726, 733 (3d Cir. 1976) ("This appeal requires us to predict how the New Jersey Supreme Court would react when presented with novel and difficult questions of tort law."); Wise v. George C. Rothwell, Inc., 496 F.2d 384, 387 (3d Cir. 1974) ("We are bound to apply the standard of care the Delaware Supreme Court would apply were it faced with the issue now before us."). Our position is in accord with the rule accepted by a majority of the other Circuits. *E.g.*, Soo Line R. Co. v. Fruehauf Corp., 547 F.2d 1365 (8th Cir. 1977); Gates Rubber Company v. USM Corp., 508 F.2d 603 (7th Cir. 1975); Warren Bros. Co. v. Cardi Corp., 471 F.2d 1304 (1st Cir. 1973).

It is regrettable that Ohio has not yet established a certification procedure that would enable this Court to obtain a definitive answer to the crucial question in this case from the Ohio Supreme Court. The United States Supreme Court has expressed its approval of such a procedure. Lehman Bros. v. Schein, 416 U.S. 386, 390-91, 394-95 (1974).

16. *E.g.*, Becker v. Interstate Properties, 569 F.2d 1203, 1205-06 (3d Cir. 1977).

17. 1A *Moore's Federal Practice*, para. 0.307, at 3077 (2d ed. 1979).

scrutinized with an eye toward the broad policies that informed those adjudications, and to the doctrinal trends which they evince.[18]

Considered dicta by the state's highest court may also provide a federal court with reliable indicia of how the state tribunal might rule on a particular question.[19] Because the highest state court "enjoys some latitude of decision in ascertaining the law applicable to a particular dispute even where there may be dicta in point,"[20] however, a federal court should be circumspect in surrendering its own judgment concerning what the state law is on account of dicta. As Professor Charles Alan Wright has written, "much depends on the character of the dictum."[21] Of somewhat less importance to a prognostication of what the highest state court will do are decisions of lower state courts and other federal courts. Such decisions should be accorded "proper regard" of course, but not conclusive effect.[22] Thus, the Supreme Court has held that although the decision of a lower state court "should be 'attributed some weight . . . the decision [is] not controlling . . .' where the highest court of the State has not spoken on the point. . . . Thus, under some conditions, federal authority may not be bound even by an

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18. Becker v. Interstate Properties, 569 F.2d 1203, 1206 (3d Cir. 1977); Medvecz v. Choi, 569 F.2d 1221, 1226 n.14 (3d Cir. 1977).

19. Nolan v. Transocean Air Lines, 365 U.S. 293 (1961).

20. 1A *Moore's Federal Practice*, para. 0.307, at 3097 (2d ed. 1979).

21. C. Wright, *Law of Federal Courts*, §58, at 270 (3d ed. 1976) ("Mere obiter may be entitled to little weight, while a carefully considered statement by the state court, though technically dictum, must carry great weight, and may even, in the absence of any conflicting indication of the law of the state, be regarded as conclusive.") (footnotes omitted).

22. *See* Commissioner v. Estate of Bosch, 387 U.S. 456, 471 (1951).

intermediate state appellate court ruling."[23] Additionally, federal courts may consider scholarly treatises,[24] the Restatements of Law,[25] and germane law review articles[26] — particularly, it seems, of schools within the state whose law is to be predicted.[27]

In sum, a federal court attempting to forecast state law must consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand. The rule of *Erie* calls on us to apply state law and not, as the dissent notes, "to participate in an effort to change it"[28] merely because we doubt its soundness. At the same time, however, blind adherence to state precedents "without evaluating the decision[s] in the light of other relevant data as to what the state law is, will result in injustice and a perversion of the state law which the federal court sets out to apply."[29] As this Court has declared:[30]

> A diversity litigant should not be drawn to the federal forum by the prospect of a more favorable out-

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23. *Id.* (quoting King v. Order of Travelers, 333 U.S. 153, 160-61 (1948)), (footnotes omitted). Unlike the dissent, I am not persuaded that the lower state court and federal court decisions relied on by the defendant, see dissenting opinion at 27, either specifically address or definitively resolve the question at issue here.

24. Patch v. Stanley Works, 448 F.2d 483, 488 (2d Cir. 1971).

25. *Id.*; Ross v. Philip Morris & Co., 328 F.2d 313 (8th Cir. 1964).

26. Southern Farm Bureau Cas. Ins. Co. v. Mitchell, 312 F.2d 485, 497 (8th Cir. 1963); Wendt v. Lillo, 182 F. Supp. 56, 60 (N.D. Iowa 1960).

27. Note, *Federal Interpretation of State Law — An Argument for Expanded Scope of Inquiry*, 53 Minn. L. Rev. 806 (1976).

28. Tarr v. Manchester Ins. Corp., 544 F.2d 14, 15 (1st Cir. 1978); majority opinion at 11.

29. 1A *Moore's Federal Practice*, §0.309, 3112 (2d ed. 1979).

30. Becker v. Interstate Properties, 569 F.2d 1203, 1206 (1977).

come than he could expect in the state courts. But neither should he be penalized for his choice of the federal court by being deprived of the flexibility that a state court could reasonably be expected to show.

IV.

In support of its conclusion that Ohio's statutes of limitation bar the McKennas' actions, the district court relied, as does the dissent here, primarily on *Wyler v. Tripi*,[31] decided nine years ago by the Ohio Supreme Court. The central dispute in that case concerned the date on which a cause of action for medical malpractice accrued. Expressly following the rule announced in a series of prior decisions,[32] *Wyler* held that the cause of action came into existence at the latest, at the time the physician-patient relationship terminated, and not when the plaintiff discovered the injury.

The "termination of treatment" concept was developed very early in Ohio law[33] as an exception to the traditional rule that statutes of limitation commenced to

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31. 25 Ohio St. 2d 164, 267 N.E. 2d 419 (1971).

32. 25 Ohio St. 2d at 164, 267 N.E. 2d at 419, *following* DeLong v. Cambell, 157 Ohio St. 22, 104 N.E. 2d 177 (1952); Bowers v. Santee, 99 Ohio St. 361, 124 N.E. 238 (1919); Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902).

The Ohio Supreme Court's consideration of the application of the "discovery rule" to statutes of limitations thus far has occurred solely in the context of actions for medical malpractice involving Ohio Rev. Code Ann. §2305.11 (Page 1954), rather than in the context of personal injury negligence actions under Ohio Rev. Code Ann. 2305.10 (Page 1954). The Ohio Supreme Court has noted, however, that the limitation-of-action question "obtains, in principle, irrespective of whether the case is treated as belonging under R.C. 2305.10 or under R.C. 2305.11." Melnyk v. Cleveland Clinic, 32 Ohio St.2d 198, 201 n.1, 290 N.E.2d 916, 917 n.1 (1973).

33. *See* Gillete v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902).

run at the time an individual sustained injury as the result of the tortious act of another.[34] It was designed, as the *Wyler* court observed, "to avoid the harsh results of the traditional rule"[35] by tolling the applicable statute of limitations until the conclusion of the physician-patient

34. *See. e.g.* Fee's Administrator v. Fee, 10 Ohio 469 (1891) (action for trespass on property). In the usual case — when the act constituting negligence causes direct and immediate injury — the action accrues and the period of limitations runs from the date of the act. When the negligent act is injurious only in its consequences, however, Ohio courts have held that the cause accrues and the limitations run only from the time that some consequential injury or damage manifests itself. In Cook v. Yager, 13 Ohio App.2d 1, 233 N.E. 2d 326 (1968), for example, the syllabus stated that where the negligent act "causes no contemporaneous injury or damage to the patient but the forces set in motion by such violation proximately cause injury or damage thereafter, then, . . . the cause and the statute of limitations pertaining to the cause of action does not begin to run until the date such consequential injury or damage first manifests itself. 13 Ohio App. 2d. at 10-11, 233 N.E. 2d at 332; *see* Brush v. Beryllium Co., 284 F.2d 797 (6th Cir. 1960). This principle of Ohio law apparently accords with the majority rule:

> As a general rule, the occurrence of an act or omission, whether it is a breach of contract or of duty, whereby one sustains a direct injury, however slight, starts the statute of limitations running against the right to maintain an action. It is sufficient if nominal damages are recoverable for the breach or for the wrong, and where that is the case it is unimportant that the actual or substantial damage is not discovered or does not occur until later.
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> 51 AM. JUR. 2d *Limitation of Actions* §109, at 681 (1970).

In the present case, the district court determined that consequential injury or damage resulting from Mrs. McKenna's ingestion of Ortho-Novum manifested itself, at the latest, in 1969 when Mrs. McKenna developed hypertension. Although the classification of this development, rather than the occurrence of Mrs. McKenna's transient ischemia attacks or excruciating headaches or, for that matter, the occurrence of the cerebrovascular stroke in 1972, as the first manifestation of consequential injury or damage seems somewhat arbitrary, it nonetheless appears consistent with the applicable principles of Ohio law.

35. 25 Ohio St.2d at 168, 267 N.E.2d at 421.

relationship. Although this doctrine represents a "marked departure from the general rule," it "affords little relief in cases where the injury is one which requires a long developmental period before becoming dangerous and discoverable."[36] In such cases, the termination exception extends the period before the statute of limitations begins to run, "but does so by a factor which bears no logical relationship to the injury incurred."[37]

It was this kind of issue with which the Ohio Supreme Court was confronted in *Wyler*. The plaintiff there alleged that improper treatment by her physician ultimately resulted in the manifestation of asceptic necrosis, necessitating the replacement of her hip and the subsequent removal of her leg. Because the plaintiff failed to discover the alleged negligence within a year after she left the care of her physician, application of either the traditional rule or the "termination of treatment" exception would not prevent what the *Wyler* majority itself termed "the unconscionable result that the injured party's right to recovery can be barred by the statute of limitations before [s]he is even aware of its existence."[38] Troubled by this result, the Ohio court examined the laws of various jurisdictions and the growing trend away from the traditional rule and towards adoption of the discovery rule. According to this approach, the statute of limitations does not begin to run until the plaintiff actually discovers, or with due diligence should have discovered, the negligence alleged.

Although the court's examination of the cases persuaded it that "there is much to recommend the adoption of the discovery rule,"[39] a bare majority nonetheless "reluctantly conclud[ed]" that "the courts of Ohio should not decree such an adoption."[40] The sole justification for

36. *Id.*
37. *Id.*
38. *Id.*
39. 25 Ohio St.2d at 170-71, 267 N.E.2d at 423.
40. *Id.*

refusing to adopt the discovery rule was that such action should be left to the legislature. The court was "convinced that to [adopt the discovery rule] would place [it] in the obvious and untenable position of having not only legislated, but of having done so directly in the face of a clear and opposite legislative intent."[41] Referring to the legislature's failure to adopt the discovery rule by legislation, the court concluded: "In consideration of the obvious and repeated disinclination of the General Assembly to amend its malpractice statute of limitations, we are compelled to adhere to our former decisions on the question and refrain from judicially adopting that which has so clearly been legislatively rejected."[42]

Notwithstanding this extensive pronouncement of the court's position, this same court during the following year employed the discovery rule in *Melnyk v. Cleveland Clinic*.[43] The plaintiff there alleged that a physician employed by the Clinic had negligently left a metallic forceps and a nonabsorbent sponge in his abdomen. Even though the plaintiff failed to discover the negligence until more than one year after he left the care of the physician, the Ohio Supreme Court refused to bar his action, and held that the applicable one-year statute of limitations was tolled "until such time as the patient discovers, or by exercise of reasonable diligence should have discovered, the negligent act."[44]

Although the *Melnyk* court took great pains, as does the dissent in this case, to distinguish *Melnyk* from *Wyler* on the ground that the former did not involve the "problems faced in the defense of a 'stale' claim for medical malpractice,"[45] the distinction, as a recent commentator on Ohio law has argued, "in essence is an artificial one."[46] On the contrary, *Wyler* expressly took note of the

41. *Id.*
42. 25 Ohio St.2d at 172, 267 N.E.2d at 424.
43. 32 Ohio St.2d 198, 290 N.E.2d 916 (1972).
44. 32 Ohio St.2d at 201, 290 N.E.2d at 918.
45. 32 Ohio St.2d at 200, 290 N.E.2d at 916.
46. 6 Akron L. Rev. 265, 273 (1973).

fact that courts adopting the discovery doctrine viewed it "as being entirely consistent with the policy of the statute of limitations to prevent 'stale claims.' "[47] The holding of *Wyler* declining to adopt the discovery rule depended not at all on the policy of discouraging stale claims, but solely upon the court's reluctance to contravene what it then believed to be the policy of the state legislature. By embracing the discovery rule in *Melnyk*, therefore, the Ohio Supreme Court "completely abandoned the rationale which served as the basis and justification for the *Wyler* decision, namely, that of legislative prerogative in this area."[48]

Melnyk's implicit rejection of the *Wyler* rationale — that only the state legislature may properly decide whether to apply the discovery rule — appears well justified. As evidence of the alleged intent of the legislature to eschew the discovery rule, *Wyler* referred to the legislature's failure to enact legislation modifying the court's prior decisions that interpreted the statute of limitations for medical malpractice.[49] Legislative inaction, however, "is a weak reed upon which to lean in determining legislative intent."[50] A statute of limitations is a product of legislation, but it is the judiciary's task to interpret and enforce such an enactment. The Ohio statute in question here is phrased in general terms and requires only that an action for bodily injury "shall be brought within two years after the cause thereof arose."[51] The legislature left unresolved when a cause of action arises and

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47. 25 Ohio St.2d at 170, 267 N.E.2d at 423.

48. 6 Akron L. Rev. 265, 272 (1973).

49. 25 Ohio St.2d at 171-72, 267 N.E.2d 419, 423-24.

50. Berry v. Branner, 245 Or. 307, 311, 421 P.2d 996, 998 (1966).

51. Ohio Rev. Code Ann. §2305.10 (Page 1954). The provision pertinent to Mr. McKenna's derivative claim is similarly phrased, but states that such actions "shall be brought within four years after the cause thereof occurred. . . ." Ohio Rev. Code Ann. §2305.09 (Page 1954).

when the statute commences to run. And, in Ohio, these kinds of determinations have always been the product of "judicial interpretation, not legislative promulgation."[52] Consequently, application of the discovery rule to the facts of this case in no way intrudes on the authority of the state legislature. Indeed, Ohio's selection of the termination exception represented not only a marked departure from the traditional rule, but also a judicial determination as to when a cause of action accrues. *Melnyk*'s choice of the discovery rule, at least in the absence of an expression by the legislature prohibiting such an adoption, therefore appears fully compatible with the court's responsibility to ascertain and comply with legislative intention.[53]

Moreover, the Ohio Supreme Court in *Melnyk* distinguished its decision in *Wyler* as speaking only to the question of *when* a cause of action arises, and not to the determination whether the running of the statute of

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52. 6 Akron L. Rev. 265, 273 (1973).

53. A further indication that the legislature did not intend to preclude judicial adoption of the discovery doctrine was provided by the recent amendment of the medical malpractice statute. Even though that statute still allows a one year period of limitations for such actions, the judiciary's role in determining when a cause of action arises and when the limitations period begins to run is implicitly recognized by a new provision which expressly provides that "in no event shall any medical claim against a physician . . . be brought more than four years after the act or omission constituting the alleged malpractice occurred." Ohio Rev. Code Ann. §2305.11(B) (Page Supp. 1978).

Moreover, without deciding the issue the court in *Melnyk* suggested that as a result of an amendment to the Ohio Constitution, Ohio's statutes of limitation may now have "become the sole demesne of the [Ohio Supreme] Court." 32 Ohio St.2d at 200 n.3, 290 N.E.2d at 917 n.3. As amended, Article IV, Section 5(B) of the Ohio Constitution now provides in part: "The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge or modify any substantive rights."

limitations is, for some reason, tolled.[54] It then proceeded to hold that the running of the statute of limitations on Melnyk's cause of action was tolled until such time as he discovered, or by the exercise of reasonable diligence should have discovered, the negligent act, even though his cause of action accrued, under *Wyler*, at the termination of the patient-physician relationship. On this analysis, the holding in *Wyler* determines only *when* the McKennas' cause of action accrued; it is inapposite to the question whether the action was tolled until such time as the McKennas could know how Mrs. McKenna's injuries occurred.

It is claimed, nonetheless, that "*Melnyk* does not overrule *Wyler*, but "merely carves out a very specific and narrow exception"[55] to the termination rule when, as in that case, surgical instruments are left in a patient's body. For this reason, the dissent would not apply the discovery rule to the circumstances of this case. In its view, we are improperly modifying a "decadent" and "unenlightened" doctrine of state law simply because we disagree with it. On the contrary, however, we fully recognize our responsibility to accurately apply the pertinent Ohio law. Indeed, we do not dispute that federal courts must faithfully adhere to state substantive law in non-federal matters. But, as commentators have emphasized, such adherence should be wise and discerning. This Court has noted only recently that "while a federal diversity court must not fashion a wholly independent federal standard with which to determine matters of substantive right, it likewise must not conceive of its role as applying the state decisional law to the case at hand in

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54. Under the longstanding Ohio "syllabus rule," only that which is stated in a syllabus or in an per curiam opinion represents an accurate and authoritative statement of law by the Ohio Supreme Court. *E.g.* In State ex rel. Canada v. Phillips, 168 Ohio St. 191, 200, 151 N.E.2d 722, 724 (1958).

55. Dissenting opinion typescript at 23.

a narrow and mechanical fashion."[56] Rather, a federal court must "be sensitive to the doctrinal trends of the state whose law it applies, and the policies which inform the prior adjudications by the state courts."[57]

In our view, the Ohio Supreme Court's decision in *Melnyk* not only abandoned the sole justification proffered for its opposition in *Wyler* to the adoption of the discovery rule, but also manifested a recognition that this approach alone avoids the harsh and inequitable results of applying the traditional rule in such cases. "Certainly a federal court sitting in diversity should not mechanically follow precedent and blindly apply principles of *stare decisis* when it appears that the corresponding state court would adjust its common law to meet changing conditions."[58] A fair scrutiny of the relevant Ohio precedents, with an eye toward the principles and policies underlying them, strongly indicates that the Ohio Supreme Court would extend the discovery rule set forth in *Melynk* to include the type of personal injury action present here.

The task of a federal court sitting in diversity is often difficult, for it must forsake its own expertise and assume that of the foreign state. Required as we are to predict how the Ohio Supreme Court would decide the present case, however, we believe that the Court would hold that the applicable statutes of limitation in this case were tolled until the McKennas knew, or by the exercise of reasonable diligence should have discovered, the cause of Mrs. McKenna's injuries. Accordingly, we reverse the judgment of the district court, and remand for further proceedings consistent with this opinion.

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56. Medvecz v. Choi, 569 F.2d 1221, 1226 (1977).

57. Becker v. Interstate Properties, 569 F.2d 1203, 1206 (1977).

58. *Id.* at 1215-16 (Hunter, J., dissenting).

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*, dissenting.

A.

Although I am as moved as my colleagues are by the alleged tragic effects from Mrs. McKenna's ingestion of appellee's birth control pills and while I am as convinced as they are that the discovery rule is a humane and desirable component of medical malpractice law,[1] I must respectfully dissent. I cannot join them because the Ohio Supreme Court has not adopted and would not now adopt the modern view on discovery in medical malpractice cases. I see no sign that Ohio is withdrawing from its views on the medical malpractice doctrines relevant to this case. The distinguished trial judge who tried this case so patiently, was not unsympathetic to the plight of Mrs. McKenna; yet from my view he is being reversed — not because he was wrong — but because the relevant Ohio law is unenlightened.

With respect, I submit that the majority disregards Ohio's current (though archaic) doctrine and announces a rule of law that Ohio should adopt. In 1971 the Ohio Supreme Court firmly and resolutely rejected the discovery rule. *Wyler v. Tripi*, 25 Ohio St.2d 164, 267 N.E.2d 419 (1971). Because I conclude that the Ohio Supreme Court would adhere to the *Wyler v. Tripi* decision, I must dissent.

B.

Ohio courts have long held that the plaintiff's inability to discover the tortious act of the defendant has no relevance to the running of the applicable statute of limitations. *E.g.*, *Kerns v. Schoonmaker*, 4 Ohio 331 (1831)

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1. In Gemignani v. Philadelphia Phillies National League Baseball Club, Inc., 287 F.Supp. 465 (E.D. Pa. 1967), I held that the Pennsylvania discovery rule tolled the statute of limitations until the plaintiff learns of the casual relationship between his physician's actions and his injury.

(negligent acts of justice of the peace); 34 Ohio Jurisprudence 2d 536. This doctrine was reaffirmed by the Ohio Supreme Court in *Wyler v. Tripi* in 1971 and applied to medical malpractice actions. In *Wyler v. Tripi*, the court rejected an explicit request of the plaintiff to overrule that harsh precedent. In declining the invitation, the court recognized that its action could "lead to the unconscionable result that [an] injured party's right to recovery [would] be barred by the statute of limitations before he is even aware of its existence." 267 N.E.2d at 421. The court relied neither on a policy justification for a short period of limitations nor on humanity considerations when it rejected the discovery rule. Indeed it noted that "[t]here is much to recommend the adoption of a discovery rule." It declined to adopt the rule on the ground that

> to do so would place us in the obvious and untenable position of having done so directly in the face of a clear and opposite legislative intent.[2]

Id. at 423.

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2. The *Wyler* court stated:

The General Assembly has often considered and left standing our interpretation of R.C. 2305.11, as announced in *Gillette*, *Bowers* and *DeLong*. In the 106th General Assembly (1965-66), House Bill No. 30 was introduced. In the 105th General Assembly (1963-64), House Bill No. 959 was introduced. Both bills would have amended R.C. 2305.11, by increasing the limitation period for malpractice to two years. Neither bill survived the scrutiny of the committee to which it was referred. A similar fate befell House Bill No. 907, which was introduced in the 103rd General Assembly (1959-60), and was designed to eliminate the statute of limitations for malpractice.

The most significant expression of legislative position occurred in the 101st General Assembly (1955-56), less than three years after this court's decision in the *DeLong* case. In that session, House Bill No. 177 was introduced to add the following language to R.C. 2305.11:

In spite of this explicit statement the majority declines to follow *Wyler*. It argues that the *Wyler* rationale would be abandoned in a 1980 decision of the Ohio Supreme Court and thus it feels free to include the discovery rule in its decision. I do not agree. None of the materials the majority cites persuades me that an abandonment of the *Wyler* rationale is in the wind, nor have I unearthed any materials that foretell such an event.

The primary source of the majority's view is *Melnyk v. The Cleveland Clinic*, 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972), a decision of the Ohio Supreme Court, decided one year after *Wyler*. In an opinion by Justice Herbert, who also wrote the *Wyler* opinion, the court stated:

NOTE 2 — *(Continued)*

> "If the action is for malpractice the cause thereof shall not accrue until the malpractice is discovered."
>
> House Bill No. 177 was rejected by the committee to which it was referred.
>
> It should also be noted that although the General Assembly has refused to adopt the discovery rule for medical malpractice cases, it has nevertheless created certain exceptions to the general operation of various other statutes of limitation. (Cf. Mosby v. Michael Reese Hospital [1964], 49 Ill.App.2d 336, 199 N.E.2d 633.) In R.C. 2305.15 and 2305.16, the General Assembly has provided that the statute of limitations is tolled if the person entitled to bring the action is under a legal disability, or if the person liable to an action departs or absconds from the state. Moreover, in R.C. 2305.09 the General Assembly specifically enacted a discovery rule "if the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property." Finally, under R.C. 2305.04, if a person is entitled to recover the title or possession of real property, but is under legal disability, the statute of limitations is tolled. Significantly and intentionally absent is any statutory provision to the effect that the lack of knowledge on the part of an injured party in a medical malpractice action operates to delay the commencement of the running of the statute of limitations. See Townsend v. Eichelberger (1894), 51 Ohio St. 213, 38 N.E. 207.

267 N.E.2d at 423.

> . . . . the negligent leaving of a metallic forceps and a nonabsorbent sponge inside a patient's body during surgery will toll the running of the statute of limitation upon that cause of action until such time as the patient discovers, or by the exercise of reasonable diligence should have discovered, the negligent act.

290 N.E.2d at 918.

Melnyk does not overrule *Wyler;* it merely carves out a very specific and narrow exception: when surgical instruments are left in a patient's body a discovery period tolls the running of the statute of limitations. The *Melnyk* court did not "abando[n] the rationale" of *Wyler* when it created this exception. Majority Opinion Typescript, at 18. The court held that the case before it did not disturb the legislative judgment. Justice Herbert noted that the limitations period in most malpractice cases reflected a balancing of the interests of physicians and patients and that the Ohio legislature had struck the balance in favor of physicians because of the difficulties of proof in most malpractice cases. The court argued that in a "foreign-objects" case the plaintiff's proof of the physician's negligence, once the existence of the foreign object was established, was irrefutable, and therefore the court felt free to include a discovery period in the "foreign objects" cases. 290 N.E.2d at 917. The *Melnyk* court carefully noted that it did not "need to disturb the holding in *Wyler*, nor interfere in the affairs of our sister branch government, in order to accord this rule of law the viability we have determined it must have." *Id.* at 918.

The following language from the beginning of the *Melynk* opinion further suggests the court was reaffirming the legislature's authority in this area.

> The *Wyler* case involved the problems faced in the defense of a "stale" claim for medical malpractice. As in other fields of highly technical and inexact science, evidence in defense of such claims is

> unusually difficult to acquire and present. . . . [T]he General Assembly exercised its prerogative in this field and enacted a statute of limitation of comparatively brief duration. *Wyler* recognized the legislative authority to so act, but as heretofore noted, did so with an unmistakable lack of enthusiasm.

Id. at 917 (footnotes omitted).

The validity of the *Wyler* rationale is underscored by a decision of the Ohio Supreme Court five years later, *Amer v. Akron City Hospital,* 47 Ohio St.2d 85, 351 N.E.2d 479 (1976). There the court deferred to the legislative judgment on statutes of limitations. In *Amer* a husband brought an action for loss of consortium because of an alleged medical malpractice upon his wife. The court held that the applicable statute of limitations "is not *tolled* until termination of the physician-patient relationship." 351 N.E.2d at 480. (quotation is from the court's syllabus) (emphasis added).[3] The husband had argued that tolling was necessary because the malpractice was not discovered until after the termination of the physician-patient relationship. If tolling was not permitted, his action would be barred before his wife's was barred, even though his action arose out of the same negligence. The court held that it would not disturb its forty-year-old rule set forth in *Kraut v. Cleveland Ry. Co.*, 132 Ohio St. 125, 5 N.E.2d 324 (1936) because the legislature had failed to change the rule, although it had recently amended portions of the code covering statutes of limitations in medical malpractice cases.

The *Amer* decision was rendered over the dissent of Justice Herbert, the author of the *Wyler* and *Melnyk* opinions. Justice Celebrezze also dissented and argued

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3. *See* Majority Opinion, Typescript at 18 n.a54, for a discussion of the importance of the court's syllabus.

that the statute of limitations should not run until the physician-patient relationship terminated. He stated:

> "Justice in this case cries out for a remedy. How can anyone be precluded from asserting a claim by a statute of limitations which expires before the discovery of the injury? How can anyone charged with the responsibility of administering justice allow such an absurdity?"

351 N.E.2d at 485.

In spite of this plea, he was unable to persuade a majority of the court to reject the legislative decision.

The *Amer* decision convinces me that the Ohio Supreme Court has not abandoned its decision not to "interfere in the affairs of [its] sister branch [of] government." *Melnyk*, 290 N.E.2d at 918. Further it shows that whether or not the Oregon courts feel that legislative inaction "is a weak reed upon which to lean," *Berry v. Braner*, 245 Or. 307, 421 P.2d 996, 998 (1966), *quoted in* Majority Opinion Typescript, at 16, the Ohio Supreme Court has chosen to lean on it.

C.

Finally, I am convinced that the majority reading of the *Melnyk* decision is incorrect because every state or federal court decision in Ohio on this question has rejected that reading, *e.g.*, *Simmons v. Riverside Methodist Hospital*, 44 Ohio App. 2d 146, 336 N.E.2d 460 (1975); *Woodgeard v. Miami Valley Hospital Society of Dayton*, 47 Ohio Misc. 43, 354 N.E.2d 720 (C.P. 1975), *aff'd mem.* No. C.A. 4772 (Ct.App. Sept. 12, 1975); *Shrewsbury v. Smith*, 511 F.2d 1058 (6th Cir. 1975), including those courts that have considered claims for injuries allegedly resulting from birth control pills. *E.g.*, *Gillan v. Searle Laboratories*, Civ. No. C-2-77-863 (S.D. Ohio, Oct. 13, 1978).

D.

The instant case reflects the inherent disadvantage of a plaintiff making the tactical decision to litigate a diversity case in a federal court[4] where the core of plaintiff's case is contingent upon a federal court anticipating a state law doctrine in the "womb of time, but whose birth is distant."[5] For we have been asked here to deliver prematurely a new Ohio statute of limitations doctrine

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4. I recognize that plaintiff originally filed suit in a Pennsylvania state court, but obviously counsel must have been aware that suits such as the instant one can be removed to a federal district court pursuant to 28 U.S.C. §1441. This court, through Judge Aldisert, described Huddell v. Levin, 537 F.2d 726, 732-33 (3d Cir. 1976) (footnote omitted) as a "troublesome case, implicating nascent concepts of state tort liability, [and] demonstrat[ing] again the impracticality of the federal diversity forum in the twentieth century." This court further emphasized:

> We are to apply New Jersey law, yet we are without the specific guidance of viable New Jersey precedents. This appeal requires us to predict how the New Jersey Supreme Court would react when presented with novel and difficult questions of tort law. Specifically we are to predict how that court would view the liability of an automobile manufacturer for the design of a head restraint in a case in which it is alleged that fatal injuries were caused by impact against the head restraint received when the decedent's stopped car was struck from behind by another car travelling at least 50 m.p.h.

Here, unlike *Huddell*, there is recent viable Ohio precedent. But we have been asked to predict that such recent precedent will be overruled.

5. In a somewhat related context Judge Learned Hand stated:

> Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty is to divine, as best it can, what would be the event of an appeal in the case before it.

Spector Motor Service, Inc. v. Walsh, 139 F.2d 809, 823 (2d Cir.) (Learned Hand, J. dissenting), *vacated and remanded*, 323 U.S. 101 (1944).

despite the fact that that concept has been expressly rejected, and recently so, by every state and federal court in Ohio.[6] I do not claim that the Ohio Supreme Court's views on when the statute of limitations starts to run in cases such as these are part of the modern or enlightened trends. But if counsel wants to test whether Ohio will have more enlightened views on the statute of limitations issues, it is far better for counsel to litigate those issues in the state courts of Ohio which have the final say on when their recently expressed views will be repudiated.

For the reasons expressed above I respectfully dissent.

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6. *See* page 25, *supra*.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2567

SONDRA L. McKENNA and
JAMES R. McKENNA,

Appellants

v.

ORTHO PHARMACEUTICAL CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 74-0808

Argued September 5, 1979

Reassigned January 2, 1980

Before: ADAMS, HUNTER and HIGGINBOTHAM,
Circuit Judges

(Filed June 17, 1980)

SUPPLEMENTAL OPINION SUR THE DENIAL OF THE PETITION FOR REHEARING

ADAMS, *Circuit Judge.*

Shortly after the opinions in this matter were filed, Counsel for Ortho Pharmaceutical Corporation brought to the attention of the Court the fact that the Governor of Ohio on March 13, 1980, signed into law a bill amending §2305.10 of the Ohio Rev. Code. While that section still states, as before, that "[a]n action for bodily injury or injuring personal property shall be brought within two

years after the cause thereof arose," the amendment now provides further that:

> For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

Relying primarily on this amendment, Ortho submitted a petition for rehearing claiming that this provision removes the basis for our decision that "the Ohio Supreme Court would extend the discovery rule set forth in *Melnyk v. Cleveland Clinic*, 32 Ohio St. 2d 198, 290 N.E. 2d 916 (1972) to include the type of personal injury action present here." (Majority opinion typescript at 19). The panel requested the McKennas to file an answer to Ortho's petition. After reviewing the parties' briefs in light of the amendment to §2305.10, we adhere to our original position.

Prior to the amendment in question, §2305.10 required that an action for bodily injury "shall be brought within two years after the cause thereof arose." Regarding the question *when* a cause of action arises, however, the statute was silent. In amending this provision, the legislature specifically stipulated that a cause of action for bodily injury caused by exposure to asbestos or to chromium arises upon the date on which the plaintiff is informed or reasonably should have become aware that he was injured by the exposure.

Ortho argues that this amendment represents a clear legislative pronouncement that the "Ohio courts are to apply a discovery rule in the two enumerated categories of cases and none other." Invoking the precept of *expressio unius est exclusio alterius*, Ortho relies on 50

Ohio Jurisprudence 2d §188 to support its contention that in Ohio the specific enumeration by the legislature of items in a statute implies the exclusion of others. Ortho then concludes, in effect, that the legislature, in specifically postponing the time when a cause of action arises in cases involving injury resulting from asbestos or chromium, thereby precluded application of the discovery rule in all other cases.

As the section immediately following that relied on by Ortho points out, however, "[t]he maxim 'expressio unius est exclusio alterius' is not of universal application and caution should be exercised in its use," *id.* §189 at 166-67. In our view, the cautious and more reasonable construction of the amendment, as well as the one we believe the Ohio Supreme Court would embrace, is that it was not meant to preclude judicial adoption of the discovery rule in appropriate circumstances. Adoption of the contrary construction would effectively abrogate that court's well-established principle, expressly reaffirmed in *Wyler v. Tripi*, 25 Ohio St. 2d 164, 267 N.E. 2d 419 (1971), that a cause of action for medical malpractice arises, at the latest, when the physician-patient relationship terminates. We believe the Ohio Supreme Court would hold that if the legislature had intended, by its passage of this amendment, not merely to extend greater protection to victims of asbestos and chromium poisoning but at the same time to deprive victims of medical malpractice of the protection they currently enjoy under the Ohio Supreme Court's decisional law, it would have done so expressly and not by implication.

Even if the amendment to §2305.10 does — by indicating specifically when a cause of action arises in cases of asbestos or chromium poisoning — effectively establish just when a cause of action must arise in all other cases, however, that would not affect our decision here. For we accepted the district court's determination that the McKennas' causes of action arose at the time conse-

quential injury resulted from Mrs. McKenna's ingestion of Ortho-Novum. Nevertheless, we held that the Ohio Supreme Court would decide that the applicable statutes of limitation were tolled until the McKenna's knew, or by the exercise of reasonable diligence should have discovered, the cause of Mrs. McKenna's injuries. In so doing, we expressly followed the distinction drawn by the Ohio Supreme Court in *Melnyk* between the question *when* a cause of action arises and the determination *whether* the statute of limitations may, for some reason, be tolled on such action. Since the amendment at issue, even if it implicates the question when a cause of action for bodily injury from birth control pills arises, does not affect the determination whether the statute of limitations respecting that action may be tolled, we adhere to our prior opinion.

Judge Hunter joins in this opinion.

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*, dissenting.

With all due respect to my colleagues, I believe that they err in their continuing adherence to their view on the roles of Ohio's legislative and judicial branches in the alteration of Ohio's statute of limitations. As I indicated earlier, it is my belief that the Ohio courts have in the past and will in the future adhere to the view that "statutes of limitation are a legislative prerogative and their operation and effect are based upon legislative policy." *Wetzel v. Weyant*, 41 Ohio St.2d 135, 323 N.E.2d 711, 713 (1975).

As is noted by the majority, the Ortho Pharmaceutical Corporation brought to the attention of this court legislation which amends Ohio's statute of limitations, §2305.10 Ohio Rev. Code, to include a discovery period for two types of injury, those caused "by exposure to asbestos or to chromium." This legislation is irreconcilable

with the panel's rationale. It clearly evidences an intention of the Ohio legislature to reject a general discovery rule that would encompass the plaintiffs' suit and to continue their traditional role in the area of statutes of limitation.

I agree with the majority that the Ohio Supreme Court would not blindly follow the rule of *expressio unius est exclusio alterius;* however, I believe that it would be followed here. First, *Wyler v. Tripi,* 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971), where Ohio's Supreme Court rejected a general discovery rule, is an implicit application of *expressio unius est exclusio alterius.* The following passage indicates that the Ohio Supreme Court would apply the rule, adverse to the plaintiffs, when it reflected upon the new amendment to §2305.10 of the Ohio Rev. Code.

> It should also be noted that although the General Assembly has refused to adopt the discovery rule for medical malpractice cases, it has nevertheless created certain exceptions to the general operation of various other statutes of limitation.

Wyler, 267 N.E.2d at 423. Second, I believe that Ohio's Supreme Court would consider the members of the Ohio General Assembly to be perfectly capable of drafting a general discovery statute and the court would hold that the General Assembly would have done so had it felt that a more general discovery rule was desirable. I note that the General Assembly has had general statutes presented to it in the past and has chosen not to adopt them. *See Wyler v. Tripi,* 267 N.E.2d at 423 (describing House Bill No. 177, introduced in the 101st General Assembly, which would have provided for a discovery period in all malpractice cases).

The majority's argument that legislative prerogative extends only to the issue of "when" a statute starts to run and not to whether it is "tolled" is simply a semantic one. The key issue here is which branch of government

decides whether these plaintiffs' suit is timely. Unlike the relationship between many state appellate courts and their respective legislatures, the Ohio courts have more frequently deferred to the Ohio General Assembly in cases of this type. On this record I believe they would also defer to the Ohio legislature and so should the United States Court of Appeals for the Third Circuit.[1]

Thus, I would grant the petition for rehearing and affirm the decision of the lower court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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1. In addition to the new amendment Ortho Pharmaceutical Corp. has forwarded to this court a decision by the Court of Appeals of Ohio, Eighth District, Saultz v. Funk, No. 38328 (May 24, 1979), in which the court refused to extend the discovery rule. This too has failed to persuade the majority. *Saultz* is merely one of an unbroken line of cases from Ohio which rejects the discovery rule announced by the majority.

IN THE COURT OF APPEALS OF OHIO

CUYAHOGA COUNTY EIGHTH DISTRICT

NO. 38328

CATHERINE SAULTZ, ET AL.

Plaintiff-Appellants

vs.

PAUL O. FUNK, M.D.

Defendant-Appellee

O P I N I O N

Dated: MAY 24 1979

APPEARANCES:

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BOOK 100 PAGE 339

S Y L L A B U S

Under R.C. 2305.11(A) a cause of action for medical malpractice accrues upon termination of the physician-patient relationship, and a claim must be filed within one year of termination. In cases involving a foreign object left in a patient's body during surgery the running of the one year limitation period is tolled following termination until the patient determines, or reasonably should have determined, that the foreign object has been left in his body. However, the termination and tolling rules applied under R.C. 2305.11(A) are subject to the limitation set forth in R.C. 2305.11(B), that in no event shall any medical claim against a physician be brought more than four years after the act or omission constituting the alleged malpractice occurred.

KRENZLER, P.J.:

This case involves the question of the timeliness of the filing of an action for medical malpractice.

On July 27, 1976, the plaintiff-appellants Catherine and Ralph P. Saultz, husband and wife, filed a complaint in the Cuyahoga County Common Pleas Court against the defendant-appellee Paul O. Funk, M.D., hereinafter referred to as appellee, arising out of a tubal ligation alleged to have been negligently performed by the appellee upon Mrs. Saultz. In their complaint the appellants stated that Mrs. Saultz entered the hospital on November 14, 1973, and that thereafter the operation was performed. It was further alleged that as a proximate result of the appellee's negligence the appellants learned in approximately September, 1974[1/] that Mrs. Saultz was pregnant; that the appellants had five other children, and that the purpose of the operation was to prevent further childbirth; that on May 14, 1976 Mrs. Saultz gave birth to a son; that due to appellee's negligence Mrs. Saultz developed an infection and diabetes; and that various expenses had been, and would continue to be, incurred resulting from appellee's

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1/ This date should properly have read September, 1975. The proper date was supplied by the appellants' response to interrogatories. Also, the appellant stated in an affidavit that the child was conceived on or about August 15, 1975. This date was not contested by the appellee and was relied upon in the lower court's opinion.

negligence. These expenses included medical expenses due to the birth, infection, and diabetes, and expenses for support and maintenance of the child. The appellants demanded judgment in the sum of $150,000.00 plus interest and costs.

In his answer to the complaint, the appellee entered a general denial to the allegations of negligence, asserted that the complaint failed to state a claim, and also raised the affirmative defense that the complaint was not timely filed and therefore was barred by the statute of limitations. No motion to dismiss was filed by appellee pursuant to Civ. R. 12(B)(6) based upon failure to state a claim upon which relief could be granted.

Interrogatories were filed by both sides, and the appellant-Mrs. Saultz filed her answers to the interrogatories on December 3, 1976. The record does not indicate that the appellee filed answers to the appellants' interrogatories.

On February 16, 1977, the appellee filed a motion for summary judgment, Civ. R. 56, alleging that the case should be dismissed since it had not been timely filed in accordance with R.C. 2305.11. Accompanying the appellee's motion for summary judgment was an affidavit in which he stated: that he had treated Catherine Saultz for a tubal ligation and that she was discharged from the hospital on November 19, 1973; that at that time arrangements were made for Mrs. Saultz to come to the appellee's office for post-operative treatments

on December 3 and 10, 1973; that these appointments were not kept; and that the appellee's last contact with Mrs. Saultz was on November 19, 1973, the day she was discharged from the hospital.

The appellants filed a reply brief to the appellee's motion for summary judgment, accompanied by an affidavit by Mrs. Saultz asserting that: in November 1973 the appellee purported to perform the tubal ligation; that the purpose thereof was to prevent further conception of children; that on or about August 15, 1975 Mrs. Saultz conceived a child; and that the child was born on May 14, 1976.

In a judgment entry and opinion filed July 22, 1977 the trial court granted the appellee's motion for summary judgment and ordered the case dismissed on the ground that the action was not timely filed.

The appellants filed a timely appeal from the judgment entered below and have presented the following assignments of error for our consideration:

I. UNDER THE PRINCIPLES OF MELNYK v. CLEVELAND CLINIC, A PHYSICIAN WHOSE CONDUCT CONSTITUTED NEGLIGENCE AS A MATTER OF LAW CANNOT RAISE THE STATUTE OF LIMITATIONS DEFENSE AGAINST A PATIENT WHO SUED THE PHYSICIAN WITHIN ONE YEAR OF DISCOVERING THE PHYSICIAN'S NEGLIGENCE.

II. IN ENACTING SECTION 2305.11(B) OF THE OHIO REVISED CODE, THE LEGISLATURE ADOPTED A LIMITED DISCOVERY RULE FOR DETERMINING WHEN A MEDICAL MALPRACTICE ACTION ACCRUES.

III. THE UNITED STATES AND OHIO CONSTITUTIONS REQUIRE THE USE OF A DISCOVERY RULE TO DETERMINE THE ACCRUAL OF A CAUSE OF ACTION FOR MEDICAL NEGLIGENCE.

A. FUNDAMENTAL FAIRNESS DEMANDS THAT A PATIENT'S RIGHT TO SUE SHOULD NOT BE CUT OFF BEFORE HER CAUSE OF ACTION MATURES.

B. EQUAL PROTECTION FORBIDS LIMITING THE DISCOVERY RULE TO FOREIGN OBJECT CLAIMANTS ONLY.

The statute of limitations applicable to medical malpractice claims is set forth in R.C. 2305.11 which pro vides in pertinent part as follows:

> "(A) An action for...malpractice, including an action for malpractice against a physician... shall be brought within one year after the cause thereof accrued....
>
> * * *
>
> "(B) In no event shall any medical claim against a physician...be brought more than four years after the act or omission constituting the alleged malpractice occurred."

The rule set forth in subsection (A) that a malpractice action must be brought within one year after it accrues is one of long standing which has been in effect since 1894. See 91 Ohio Laws 299. Much litigation involving this rule has centered around the question of when such an action ac-

cures and when the one year period commences to run. Subsection (B) is a recent amendment to the statute which became effective in 1975. See Am. Sub. House Bill 682, 1975 Laws of Ohio 4-160 (Baldwin). Appellants' first assignment of error raises the issue of when the one year limitation period contained in subsection (A) began to run on their malpractice claim. Their second assignment of error requires us to determine the correct meaning of subsection (B) and its proper interrelationship with, and effect upon, the rule set forth in subsection (A).

In order to place appellants' assignments of error in proper perspective, we shall first summarize the present Ohio law governing the time within which an action for malpractice must be filed.

For purposes of interpreting subsection (A), there are three principal points in time when a cause of action for malpractice might be said to accrue: (1) on the date when the relationship between the plaintiff-patient and the defendant-physician terminates (the "termination rule), see e.g. Wyler v. Tripi (1971), 25 Ohio St. 2d 164; (2) on the date when the act or omission constituting the alleged malpractice is discovered or in the exercise of reasonable diligence should be discovered, (the "discovery" rule), see, e.g. Whitfield v. Roth (1974), 10 Cal. 3d 874, 112 Cal. Rptr. 540, 519 P.2d 588; Ala. Code, §6-5-482; (3) on the date when the

act or omission actually occurred. The latter rule, while perhaps the most definite and easiest to administer, is also the most strict. Most courts have developed exceptions to that rule in order to avoid the harsh results often arising in malpractice cases. See Wyler v. Tripi, supra at 166.

The termination and discovery rules each have strengths and weaknesses in terms of serving public policy interests in forestalling stale claims, protecting mutual trust in the physician-patient relationship, preventing a patient from being deprived of a bona fide but as yet undiscovered claim.

Taken alone, neither rule serves to prevent stale claims which may be difficult to defend against long after the occurrence of the act or ommission at issue. A patient may either continue his relationship with the docter for a number of years, during which time the termination rule would postpone commencement of the statutory limitation period, or he may fail to discover his injury for a similarly long period during which the discovery rule would have the same effect.

The termination rule is justified by the rationale that it strengthens the physician-patient relationship. See Wyler v. Tripi, supra. "The patient may rely on the docter's ability until the relationship is terminated and the physicia has the opportunity to give full treatment, including the immediate correction of any errors in judgment on his part."

Id. at 168. In short, the termination rule is designed to avoid forcing a patient to sue his doctor. This rule suffers from the weakness that a patient may be forced to forfeit a valid claim where the physician-patient relationship terminates, and the statutory period expires, before the injury is or reasonably should be discovered. "The termination rule is further fallible in that it requires the patient to determine at the time the relationship is terminated, that malpractice has taken place, when in fact he may have relied upon the very advice that constitutes malpractice." Wyler v. Tripi, supra at 168.

Generally the discovery rule favors the patient by extending commencement of the statutory period until he discovers or should discover the malpractice, thus reducing the possibility that a valid claim will be lost. Where the injury is discovered during a continuing course of treatment, however, to require the patient to sue may be seen as destroying the mutual confidence in the physician-patient relationship. Ishler v. Miller (1978), 56 Ohio St. 2d 447, 449 (per curiam). "Such a requirement would place the patient in the unacceptable situation of deciding whether to continue the ongoing treatment and thus risk the chance of forfeiting his right to bring suit at a later date, or terminate the relationship, and perhaps, deny the physician the opportunity of correcting his error." Id.

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The Ohio Supreme Court has traditonally followed the termination rule in malpractice cases. See e.g. Ishler v. Miller, supra; Wyler v. Tripi, supra; DeLong v. Campbell (1952), 157 Ohio St. 22; Bowers v. Santee (1919), 99 Ohio St. 361. In Wyler v. Tripi, supra, the court thoroughly examined the advantages and disadvantages of the termination and discovery rules, and although it acknowledged that "there is much to recommend the adoption of the discovery rule," reluctantly concluded the courts should leave adoption of such a rule to the legislature. Id. at 170-71. This it was noted the legislature had failed to do despite numerous opportunities. Id. at 171.

In a 1972 case where the defendant-surgeon failed to remove a metallic forceps and a nonabsorbent sponge from the plaintiff-patient's body following surgery, the Ohio Supreme Court devised a "foreign object tolling rule." See Melnyk v. Cleveland Clinic (1972), 32 Ohio St. 2d 198. The court expressly declined to disturb its holding in Wyler v. Tripi, supra, which it noted was not a "foreign object" case, that a cause of action for medical malpractice accrues at the time that the physician-patient relationship terminates. Rather it held that:

> "Where a metallic forceps and a nonabsorbent sponge are negligently left inside a patient's body during surgery, the running of the statute of limitation governing a claim therefor is tolled until the patient discovers, or by the exercise

> of reasonable diligence should have discovered the negligent act. (Wyler v. Tripi, 25 Ohio St. 2d 164, distinguished.)" Melnyk v. Cleveland Clinic, supra (syllabus).

Thus, in Melnyk the Supreme Court devised a special "tolling" rule under what is now R.C. 2305.11(A) whereby the plaintiff's cause of action accrued upon termination, but the one year statutory period did not begin to run until the patient determined, or by reasonable diligence should have determined, that the foreign objects were left in his body during surgery.

In support of its decision the court noted that it was difficult to imagine a defense to the act charged, and that "as problems of proof and defense dwindle, so does the persuasiveness of the 'stale claims' reasoning." Id. at 200.

In their first assignment of error appellants contend that the tolling rule devised by the Supreme Court in Melnyk extends to all cases involving acts that can be labelled "negligence as a matter of law," and therefore that their action was timely filed under R.C. 2305.11(A). Appellee contends on the other hand that the Melnyk rule applies only to cases where foreign objects are left in a patient's body during surgery, and therefore that the one year statute of limitations in the instant case commenced to run upon termination of the physician-patient relationship.

The record shows: that the operation in question took place sometime between November 14 and 19, 1973; that

the physician-patient relationship terminated at the latest on December 10, 1973; that Mrs. Saultz determined that she was pregnant in September, 1975; and that this action was filed on July 27, 1976. Thus the complaint was filed within one year of determination of appellee's alleged negligence, but not within one year of termination of the physician-patient relationship.

The tolling rule devised in Melnyk v. Cleveland Clinic, supra, was applied only to the facts present in that case. It does not extend to all cases involving negligence as a matter of law. As we interpret Melnyk, the running of the statute of limitations is tolled only in those cases where a foreign object or objects are left in a patient's body following surgery. Other courts which have addressed the question reached a similar conclusion, and refused to apply Melnyk to cases where no foreign object was left in a patient's body following surgery. See Simmons v. Riverside Methodist Hospital (1975), 44 Ohio App. 2d 146; Woodgeard v. Miami Valley Hospital Society (Montgomery Cty. C.P. 1975), 47 Ohio Misc. 43.

Based on the allegations contained in the complaint in the instant case, this action involves negligent performance of a tubal ligation and is not a "foreign object" case. Thus the Melnyk rule does not apply. For purposes of R.C. 2305.11(A), appellants' cause of action for malpractice ac-

crued, and the one year statutory period began to run, on the date that the physician-patient relationship terminated. Accordingly, appellants' first assignment of error is overruled.

Following the Supreme Court's decision in Melnyk v. Cleveland Clinic, supra, the General Assembly amended the statute of limitations governing malpractice claims by enacting R.C. 2305.11(B), effective July 28, 1975, which provides in pertinent part:

> "In no event shall any medical claim against a physician...be brought more than four years after the act or omission constituting the alleged malpractice occurred." (Emphasis added)

In their second assignment of error, appellants contend that by enacting subsection (B) the legislature impliedly adopted a limited discovery rule which applies to all medical malpractice actions and operates within the four year period set forth in subsection (B). Thus they contend that an action is timely if filed within one year of discovery, and also no more than four years after the act of malpractice.

Appellee contends on the other hand that subsection (B) does not repeal the existing termination rule in favor of a discovery rule; that it merely operates to cut off stale claims by establishing an outside limit of four years from the act of malpractice within which to file a claim; and that subsection (B) would be pertinent in the instant case only if the physician-patient relationship terminated more than three

years after the act of malpractice, and that in such a case subsection (B) would serve to shorten, not extend, the period for filing a claim.

Thus, as a matter of statutory construction we must determine the correct meaning of subsection (B), as well as its proper interrelationship with subsection (A).

Upon examination of R.C. 2305.11(B) we find that its terms are clear and unambiguous. The statute provides that in no event shall any medical claim be brought more than four years after the act or omission constituting the alleged malpractice occurred. The statute does not mention a limited discovery rule, nor does it indicate a legislative intent to adopt such a rule. Moreover, subsection (B) does not indicate that the legislature intended to overrule altogether the termination and tolling rules previously adopted by the Supreme Court. Rather the legislature limited the period during which the termination and tolling rules may extend the period for bringing a claim under subsection (A).

Prior to passage of subsection (B), the Supreme Court determined that a cause of action for medical malpractice accrued, and the one year statute of limitations began to run, only upon termination of the physician-patient relationship. Wyler v. Tripi, supra. In cases involving foreign objects, the cause of action still accrued at termination, but in such cases the statute of limitations was tolled

following termination until the plaintiff determined that a foreign object had been left in his body during surgery. Melnyk v. Cleveland Clinic, supra. Under these decisions, a patient who either continued his treatment relationship with his doctor, or failed to determine that a foreign object was present, could bring an action many years after the occurrence of the act or omission of negligence upon which his claim was based. Thus former R.C. 2305.11, as interpreted, did not always prevent the prosecution of stale claims. By enacting subsection (B), the legislature limited the termination and tolling rules to the extent that they previously would have allowed a claim to be filed more than four years after the act or omission alleged to constitute malpractice. The legislature did not otherwise overrule the termination and tolling rules, except to the extent that they conflict with the four year limitation in subsection (B).

Thus in order to satisfy subsection (A) one must still file a claim within one year of termination, unless Melnyk applies, in which case the one year statutory period is tolled following termination until the patient determines, or reasonably should determine, that a foreign object has been left in his body during surgery. Subsection (B) adds the requirement that "in no event shall any medical claim...be brought more than four years after the act or omission constituting the alleged malpractice occurred." R.C. 2305.11(B) (Emphasis added).

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This means that if in a "foreign object" case the physician-patient relationship is terminated as early as the date of the act or omission, the running of the one year statute of limitations under R.C. 2305.11(A) is tolled until the patient determines, or reasonably should determine, that a foreign object was left in his body, but in no event, under R.C. 2305.11(B), may the action be brought more than four years after the act or omission.

In cases not involving foreign objects there are at least three other situations in which it is necessary to determine the proper interrelationship of subsections (A) and (B). These situations and the proper results may be illustrated as follows:

1. The physician-patient relationship terminates and a year passes subsequent to termination, while the four year period set forth in subsection (B) has still not yet expired. Here subsection (A) controls and the action must be brought within a year of termination regardless of when the four year period expires.

2. The physician-patient relationship continues for more than four years after the act or omission alleged to constitute malpractice occurred. Here, subsection (B) controls and the action must be brought within four years of the date of the act or omission regardless of when the relationship terminates.

3. The physician-patient relationship terminates within four years of the act or omission, but the one year period after termination extends beyond the four year period after the act or omission. Again, subsection (B) controls and the action must be brought within four years of the date on which the act or omission occurred, rather than within the one year period following termination.

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Upon first examination, application of the four year limit in the latter two examples may appear to be inconsistent with the underlying rationale of the termination rule which is to avoid forcing a patient to sue his treating physician. In reality, however, this is not the case. In effect, the four year limitation forces termination within a four year period since in all but the highly unusual case the patient will cease consulting the physician before or at the time when he must bring suit. Thus by the time the action commences the patient will have terminated his relationship with the doctor.

We have previously determined that the instant case is not governed by the Melnyk rule, and the record demonstrates that the physician-patient relationship terminated and one year passed prior to expiration of the four year limit set forth in subsection (B). Therefore this case falls within the first example given above, and appellant was required to file her action within one year after termination. The record shows that the physician-patient relationship terminated at the latest on December 10, 1973, and thus appellant was required to file her claim within a year from that date. Since her claim was not filed until July 27, 1976, it was barred by R.C. 2305.11(A).

We realize that the statute as presently written operates in a harsh manner and may often serve to cut off a

valid claim before a patient has discovered or reasonably could discover that a cause of action exists. We are unable to see, however, how subsection (B) may be interpreted as adopting a discovery rule and thereby as adding an extra dimension on to the time when this action accrued for purposes of subsection (A). To the contrary, subsection (B) limits the existing termination and Melnyk rules by shortening the previous statutory period in those cases where the physician-patient relationship terminates, or the patient determines the presence of a foreign object, more than three years after the act of malpractice.

Accordingly, appellants' second assignment of error is overruled.

In their third assignment of error, appellants contend that application of the statute of limitations to bar their claim violates due process of law and denies them equal protection of the laws contrary to the Fourteenth Amendment of the United States Constitution, and also contrary to Article I, Section 16 of the Ohio Constitution which is equivalent to the due process clause. See Barnhardt v. Linzell (1957), 104 Ohio App. 243.

Appellants first argue that due process requires a discovery rule. This is incorrect. Due process does not require that a statute of limitations governing malpractice claims be extended until the injury is discovered or should

be discovered. Clark v. Gulesian (1st Cir. 1970), 429 F.2d 405, cert. denied, (1971), 400 U.S. 993; Owen v. Wilson (1976), 260 Ark. 21, 537 S.W. 2d 543; Laughlin v. Forgrave (Mo. 1968), 432 S.W. 2d 308 (En Banc).

Appellants also argue that application of the termination rule in the instant case violates equal protection, since in foreign object cases the Melnyk "tolling" rule is applied. This is also incorrect. Ohio has one general rule which is applied in malpractice cases, and that is the termination rule. The running of the statute is tolled only where a foreign object is left in a patient's body during surgery. See Melnyk v. Cleveland Clinic, supra. The application of a different statute of limitations or a different date on which the statute commences to run in a particular class of actions does not violate equal protection so long as the classifications are reasonable, not discriminatory, and apply to and affect alike all persons and actions within the class. Laughlin v. Forgrave, supra. The distinction between foreign object cases and other medical malpractice claims is neither unreasonable nor arbitrary, and appellants are treated equally with all other plaintiffs bringing malpractice claims in cases not involving foreign objects. Accordingly they are not denied equal protection of the laws. Appellants' third assignment of error is therefore without merit and is overruled.

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In summary, appellants' cause of action for malpractice accrued at the latest on December 10, 1973 when Mrs. Saultz failed to keep her final appointment with appellee and the physician-patient relationship terminated. See Wyler v. Tripi, supra. Appellants were required to bring this action within one year of that date. R.C. 2311.05(A). Since they did not file the instant action until July 27, 1976, more than two and one-half years later, the action was not timely. Hence the trial court properly granted the appellee's motion for summary judgment.

Judgment affirmed.

JACKSON, J.,
CORRIGAN, J., CONCUR

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Alfred T. Spangler, :
and
Martha Spangler, :

Plaintiffs-Appellants, :

v. : No. 77AP-586

Southern Mills, Inc., :
and
Zellermayer Supply Corp., :

Defendants-Appellees. :

D E C I S I O N

Rendered on February 2, 1978

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Supply Corp.

STRAUSBAUGH, J.

This is an appeal by plaintiffs from a judgment of the Common Pleas Court in favor of defendants dismissing plaintiffs' complaint with prejudice.

The plaintiff's action filed herein on February 18, 1977, stating causes of action in negligence and breach of warranty against the defendants alleged:

> " * * * that prior to September, 1974, he was employed by Raybestos-Manhattan, Inc. of Bridgeport, Connecticut to sell and service asbestos pads * * * that his work consisted of removing and installing asbestos pads or covers on flat-work irons using products supplied by both Defendants and that part of this work was done by hand and by using an air compressor to blow excess asbestos off the irons; that in this work process substantial quantities of asbestos fumes and dust particles were inhaled by plaintiff.
>
> "5. Plaintiff's employment with Raybestos-Manhattan was terminated on September 6, 1974 * * *
>
> "6. Plaintiff thereafter began having great difficulty breathing and in March, 1975, and thereafter was diagnosed as having 'Pneumonoconiosis' or 'abestosis' and obstructive lung disease as a direct and proximate result of inhaling asbestos fumes and dust over the period of his employment. * * *"

Thereafter, both defendants filed motions to dismiss because the action was not brought within the applicable statute of limitations. On June 13, 1977, the Common Pleas Court upon consideration of the pleadings, exhibits, and memorandum of counsel, sustained defendants' motions finding that the applicable statute of limitations has run and that the complaint fails to state a cause of action.

Plaintiffs' single assignment of error is:

> "The decision of the Court of Common Pleas of Franklin County, Ohio, dated June 13, 1977, sustaining Motions to Dismiss and applying Ohio Revised Code Section 2305.10 unconstitutionally denies Plaintiff's 5th Amendment and 14th Amendment, United States Constitution rights of due process and equal protection of the laws."

The argument made by plaintiffs is compelling and not without a great deal of merit as were those arguments before this court in *Simmons v. Riverside Methodist Hospital* (1975), 44 Ohio App. 2d 146, wherein we held, in an action for medical malpractice against a physician wherein allegations were made that incorrect blood tests were conducted, that the one year statute of limitations regulating such an action is not tolled until the negligence is discovered, as where a foreign object is found inside a former patient, but that the cause of action accrues when the physician-patient relationship finally terminates. In that case we reviewed the law as set forth by the Supreme Court in *Hyler v. Tripi* (1971), 25 Ohio St. 2d 164, wherein the Supreme Court held that under R. C. 2305.11, a cause of action for medical malpractice accrues, at the latest, when the physician-patient relationship finally terminates.

In *Melnyk v. Cleveland Clinic* (1972), 32 Ohio St. 2d 198, the Supreme Court distinguished *Wyler* by adding a new element of tolling, holding that:

> "Where metallic forceps and a nonabsorbant sponge are negligently left inside a patient's body during surgery, the running of the statute of limitation governing a claim therefor is tolled until the patient discovers, or by the exercise of reasonable diligence should have discovered, the negligent act. * * *"

In this case we find plaintiffs' assignment of error to be not well taken. We therefore limit, as has the Supreme Court, the rule as set down in *Wyler* to the surgical malpractice suits as set forth in *Melnyk*. It may well be true as plaintiffs have so ably argued herein that the results in the present case may be more grievous than those in *Wyler*. However, such determinations are within the policy making area which should be considered and deliberated in a legislative body not by the courts. However, if judicial legislation be indulged in such change should be made by the Supreme Court of this state and not by this court. Plaintiffs' single assignment of error is overruled, and the judgment is affirmed.

Judgment affirmed.

REILLY and McCORMAC, JJ., concur.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

Alfred T. Spangler et al.,
Appellants,

vs.

Southern Mills, Inc., et al.,
Appellees.

78
19..... TERM

To wit: May 11, 1978

No. 78-399

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

for FRANKLIN *County*

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Stanley S. Smith

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

THE STATE OF OHIO, } 19 78 TERM
City of Columbus. } To wit: May 11, 1978

Alfred T. Spangler et al.,
Appellants,

vs.

Coulborn Mills, Inc., et al.,
Appellees.

No. 78-399

APPEAL FROM THE COURT OF APPEALS

for FRANKLIN County

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this ..... day of ..... 19 .....

..... Clerk

..... Deputy

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 37404

Beatrice Kottler, et al.

PLAINTIFF-APPELLANTS

-vs-

University Hospitals of Cleveland

DEFENDANT-APPELLEE

APPEAL FROM

Common Pleas COURT

No. 952,095

JOURNAL ENTRY AND OPINION

DATE MAY 4 1978

PRYATEL, J.

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

This is an appeal by the plaintiff, Beatrice Kottler (the appellant herein) from a partial summary judgment entered on December 6, 1976 in favor of the defendant, University Hospitals of Cleveland (the appellee herein), holding that the

> "complaint [filed February 2, 1976], insofar as it is based upon allegations against University Hospitals, its agents, servants or assigns for any action or failure to act on or before February 1, 1974 is barred by the statute of limitations set forth in Ohio Revised Code §§2305.10 and 2305.11."

The court's judgment was based on the following facts as set forth in its Judgment Entry:

". . .[O]n January 22, 1974, Plaintiff was admitted to University Hospitals on the private service of Dr. Lee Rubenstein, M.D., for a vaginal hysterectomy; that the proposed hysterectomy was performed by Dr. Rubenstein on January 23, 1974; that on January 29, 1974 Dr. Rubenstein ordered two units of whole blood for transfusion to Plaintiff; that the first unit of blood was started on January 29, 1974 at 8:40 p.m. by the University Hospitals staff physician; that the transfusion of that unit was terminated at 11:45 p.m. on January 29, 1974; that no further efforts to transfuse blood occurred thereafter; that at page 23 of the hospital records of University Hospitals attached to Defendant's motion for summary judgment, a notation appears which indicates that on February 2, 1974 results of a hemotology test were recorded with respect to the Plaintiff Beatrice Kottler; and, that on February 3, 1974, at the order of her personal physician, Dr. Lee Rubenstein, M.D., the Plaintiff Beatrice Kottler was discharged from University Hospitals.

"Further, the Defendant University Hospitals has asked this Court to assume, for the purposes of this motion only and in the interest of removing even a scintilla of conflict over relevant material issues, that the Plaintiff, in fact, subsequent to January 30, 1974 manifested the symptoms and in fact developed serum hepatitis; that the serum hepatitis was proximately caused by a negligent transfusion of blood by Defendant on January 29, 1974 at 8:40 p.m., said transfusion terminating at 11:45 p.m. on that same day; and, that the Plaintiff did not 'discover' she had hepatitis until February 3, 1974, said date representing the earliest possible date of discovery. The Court, only for the purposes of determining the motion for partial summary judgment, will accept this concession from University Hospitals."

At the conclusion of its Judgment Entry the trial court expressly determined pursuant to Civ. R. 54(B) that there was no just reason for delay, and thereby finalized the judgment for appeal.

The appellant filed a timely notice of appeal and raises two assignments of error.

Assignment of Error #1:

"PLAINTIFF'S CAUSE OF ACTION DID NOT ACCRUE UNTIL THE ONSET OF HEPATITIS IN MARCH OF 1974 SINCE BEFORE THAT PLAINTIFF DID NOT INCUR ANY INJURY AND COULD NOT HAVE BROUGHT SUIT AT THAT TIME."

This assignment of error is not well taken.

Where an action for bodily injury is based on negligence, the law may designate one of three different dates that triggers the statute of limitations, (1) when the wrongful act or omission occurred, (2) when such act or omission resulted in injury, or (3) when the injury was or, by the exercise of reasonable diligence, should have been discovered. Cf. Wyler v. Tripi (1971), 25 Ohio St. 2d 164.

A discussion of statutes of limitation in general is helpful here to understand the problem under review.

The Supreme Court of Ohio has long held the view that absent a statutory exception, a statute of limitation begins to run when the wrongful act or omission complained of occurs. Wyler v. Tripi, supra, at 166 (dictum). Williams v. Pomeroy Coal Co. (1882), 37 Ohio St. 583 (alternative holding); Fee v. Fee (1841), 10 Ohio 469. Squire v. Guardian Trust (8th Dist. 1947), 79 Ohio App. 371, at 383 and 389 (alternative holding). The Court has rejected the view that the statute begins to run, when the resulting damage occurs or is discovered. Wyler v. Tripi, supra; DeLong v. Campbell (1952), 157 Ohio St. 22; Kerns v. Schoonmaker (1831), 4 Ohio 331; Squire v. Guardian Trust, supra at 389.

Williams v. Pomeroy Coal Co., supra, was an action for trespass committed by the defendant coal company. In 1858, the coal company leased a parcel of land for mining. While excavating the coal from that lot, the coal company mined part of the adjoining lot. In 1862, the coal company completed its mining and surrendered the leased parcel, leaving behind abandoned mines which accumulated water. The plaintiff purchased the adjoining lot in 1864, also for mining. In 1868, miners in plaintiff's land struck an abandoned mine (left by the coal company) which flooded the plaintiff's mine. The court held that the plaintiff's suit could not be maintained because the plaintiff was not the owner of the land at the time the trespass was committed, and if he had been the owner, the action would be barred by the four-year statute of limitations relating to trespass. Paragraph 2 of the Court's syllabus states:

> "In the application of the statute of limitations there is no distinction between trespass under ground and upon the surface; nor whether the cause of action was known or unknown to the plaintiff within the time limited by statute."

After Williams v. Pomeroy Coal Co., supra, was decided, the General Assembly amended R.C. 2305.09 (formerly G.C. 11224) to provide, in part, as follows:

> "If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered . . ." (emphasis supplied).

In DeLong v. Campbell, supra, at 28, according to the Supreme Court, the change in the statute for the action of trespass to accrue "when the wrongdoer is discovered" "was unquestionably enacted by the General Assembly as the result of the decision of this court in

Williams v. Pomeroy Coal Co. . . ." In deciding "whether, as to a cause of action for malpractice by a physician, the statute of limitations begins to run at the termination of the physician-patient relationship or whether the statute begins to run from the time the patient discovers the malpractice," the court in DeLong reasoned:

> "Had the legislative branch of government intended that the statute [present R.C. 2305.11] should not begin to run until discovery by the patient of the malpractice, it could have added a provision to that effect, just as it did in Section 11224, General Code [present R.C. 2305.09]."

Again, upon a recent review of the same question raised in DeLong, the Supreme Court, in Wyler v. Tripi, supra, reaffirmed its earlier decision and followed the same reasoning, stating:

> "Although an examination of the cases reveals that there is much to recommend the adoption of the discovery rule, we reluctantly conclude that courts of Ohio should not decree such an adoption. We are convinced that to do so would place us in the obvious and untenable position of having not only legislated, but of having done so directly in the face of a clear and opposite legislative intent." (footnote omitted).

The statute under review in the present case, R.C. 2305.10, provides that "an action for bodily injury . . . shall be brought within two years after the cause thereof arose." Like R.C. 2305.11, reviewed in Wyler v. Tripi, supra, this statute (2305.10) has not been amended to suspend the running of the period of limitation until the injury occurred. We hold that the same reasoning applies to present R.C. Section 2305.10. Had the legislature intended that this statute begin to run when the injury resulted rather than when the wrongful act occurred, it could have amended the law to that effect. We are, therefore, bound by the reasoning of the Supreme Court in Wyler v. Tripi not to imply that which the legislature intended to omit.

According to the appellee's brief, the statute of limitations (R.C. 2305.10), and not the one-year malpractice statute of limitations (R.C. 2305.11) is at issue here. In oral arguments in response to the court, the appellants' counsel was unwilling to go that far. Because the trial court did state in its Judgment Entry that both statutes barred the appellant's suit, and the appellant apparently has submitted both for consideration on appeal, we have also reviewed the question of whether the appellant's suit was filed within the one-year period of R.C. 2305.11. We hold that it was not.

The one-year statute (2305.11) began to run at the latest on February 3, 1974, the date that the appellant terminated her contractual relationship with the hospital. Wyler v. Tripi, supra. Any malpractice claim that the appellant may have had due to the appellee's negligence prior to February 3, 1974 was barred by the time she filed her complaint on February 2, 1976, (more than one year later).

The appellant's first assignment of error is overruled.

Assignment of Error #2:

> "EVEN IF PLAINTIFF HAD A CAUSE OF ACTION ON JANUARY 29, 1974, AS DEFENDANTS CONTEND, THIS CASE IS WITHIN THE FOREIGN OBJECT EXCEPTION OF MELNYK VS. CLEVELAND CLINIC."

This assignment of error is not well taken.

The Court in Melnyk v. Cleveland Clinic (1972), 32 Ohio St. 2d 198 (Wyler v. Tripi, supra, distinguished), adopted a "discovery rule" in construing the medical malpractice statute of limitations (R.C. 2305.11) for cases where surgical instruments are left in patients. The statute of limitations in a case where such a "foreign

object" is left in the patient begins to run when the object is discovered or should have been discovered. The appellant seeks to extend this exception to this case, where the contamination in the transfused blood is the alleged "foreign object."

We hold, however, that the reasoning behind the "foreign object" exception is not applicable under the facts of the present case. The reasoning stated in Melnyk v. Cleveland Clinic, supra, is as follows:

> "Under the record presented here, we are not now faced with facts akin to those in Wyler. In the instant case, it is difficult, if not impossible, to imagine a defense to the act charged. To carelessly leave large and obvious metallic forceps and a nonabsorbent sponge in a surgical patient's body is negligence as a matter of law, and the proof thereof is generally unsusceptible to speculation or error. The relationship between the utterly helpless surgical patient and his surgeon, during surgery, is such that the latter must be held to have assumed the responsibility for the removal of such articles, excepting only those which are intentionally left there for sound medical reasons. Furthermore, as problems of proof and defense dwindle, so does the persuasiveness of the 'stale claims' reasoning." 32 Ohio St. 2d 198, at 200. (footnotes omitted)

By contrast, the transfusion of contaminated blood involves problems of proof and defense which do not occur where surgical instruments are left in a patient.

The second assignment of error is overruled.

RECEIVED FOR FILING

MAY 4 - 1978

GERALD E. FUERST

By Peggy Magyar Deputy

It is ordered that appellee(s) recover of appellant(s) ....its..... costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the .....

.....Common Pleas..... Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

PARRINO, P.J.

JACKSON, J.

PRYATEL, J., CONCUR.

August Pryatel

JUDGE

August Pryatel

For plaintiff-appellants: Robert Senor, Esq.

For defendant-appellee: Hugh M. Stanley, Jr., Esq.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision [illegible] Ten (10) days from the date hereof this document will be stamped to indicate

NO. 78-8424

FILED

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FEB 9 1979

JOHN P. HEHMAN, CLERK

MARY LOU CLUTTER, EXECUTRIX OF THE ESTATE OF RUSSELL L. CLUTTER,

Plaintiff-appellant

vs.

ORDER

JOHNS-MANVILLE SALES CORP., ET AL.,

Defendants-appellees.

BEFORE: CELEBREZZE and LIVELY, Circuit Judges, and PECK, Senior Circuit Judge.

Plaintiff-appellant has petitioned for permission to appeal, pursuant to 28 U.S.C. §1292(b), from an order of the district court granting partial summary judgment. Contrary to the requirements of §1292(b), it does not appear that there is substantial ground for difference of opinion on the question of law at issue. The Supreme Court of Ohio has spoken clearly on the matter. See Wyler v. Tripi, 25 Ohio St. 2d 164 (1971). See also Melnyk v. Cleveland Clinic, 32 Ohio St. 2d 198 (1972).

Therefore, it is hereby ORDERED that the petition for permission to appeal be denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

FILED
1978 OCT 20 AM 9:00
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

MARY LOU CLUTTER, Executrix of the Estate of RUSSELL L. CLUTTER	)	C78-229
Plaintiff	)	
v.	)	
JOHNS-MANVILLE SALES CORP., et al.	)	
Defendant	)	

MEMORANDUM AND ORDER

THOMAS, J.

Mary Lou Clutter, executrix of the estate of and the wife of Russell L. Clutter, brings both a survival action for injuries to Mr. Clutter and a wrongful death action. Both claims are alleged to have resulted from the asbestos-related disease of mesothelioma. The original suit for personal injuries was filed on March 6, 1978 by Russell Clutter. On August 17, 1978 Mr. Clutter died. Subsequently, on September 29, 1978 the court granted an amendment to the complaint substituting Mary Lou Clutter as executrix for Russell Clutter and adding a wrongful death claim.

Russell L. Clutter was employed by Rockwell International in its Ashtabula, Ohio Highway Brake Shoe Division from March 8, 1962 through April 25, 1964. He was allegedly exposed to various products of the defendants that contained asbestos during that period.

Plaintiff has stated that:

> Subsequent to April 25, 1964, Russell L. Clutter was self-employed and never again exposed to the asbestos fiber.
>
> From 1964 until February, 1977, plaintiff, Russell L. Clutter, lived his life without any symptoms or knowledge that he was afflicted with an asbestos-related disease. Commencing February 17, 1977, plaintiff was admitted to Geneva Memorial Hospital...As the medical records and reports so vividly establish...it was not until August, 1977 that Dr. Terrence P. Horrigan of University Hospitals, Cleveland, Ohio was able to establish a firm diagnosis of malignant pleural mesothelioma and to establish that the cause of the pleural mesothelioma was his exposure to asbestos during the years 1962 to 1964.

Defendant Bendix Corp. has moved to dismiss the survival action under Fed.R.Civ.P. 12(b)(6) and, alternatively, for summary judgment under Fed.R.Civ.P. 56. The basis of Bendix's motion is that Ohio's two-year statute of limitations for personal injury, O.R.C. §2305.10,[1] has expired. Mr. Clutter was last exposed to asbestos on April 25, 1964 and this suit was filed on March 6, 1978.

---

1. O.R.C. §2305.10, "Bodily injury or injury to personal property," provides:

> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

Defendant points to Kerns v. Schoonmaker, 4 Ohio 331 (1831), for the longstanding proposition:

> [The s]tatute of limitations commences to run as soon as the injurious act complained of is perpetrated, although the actual injury is subsequent, and could not immediately operate.

Reliance is placed upon Williams v. Pomeroy Coal Co., 37 Ohio St. 583, 589 (1882), for the corollary proposition that:

> There is no distinction in the application of the statute of limitations whether the cause of action is known or unknown to the plaintiff within the time limited by the statute.

Bendix argues that Wyler v. Tripi, 25 Ohio St. 2d 164 (1971), indicates that the law of Ohio still requires that the claim of injury be presented within two years of the acts alleged to have caused the injuries. Wyler considered the time from which a statute of limitations for medical malpractice ran. The appellant urged that the court abandon its prior rulings and hold the statute does "not commence to run until the patient actually discovers, or reasonably should have discovered, the negligent act." Id. at 166. The court stated at the beginning of its discussion:

> It is generally stated that a cause of action accrues when the wrongful act complained of is committed, and not as of the date the damage is discovered or reasonably should have been discovered. E.g., 34 Ohio Jurisprudence 2d 536, Limitation of Actions, Section 58; 34 American Jurisprudence 94, Limitation of Actions, Section 115.

Id. at 166. After a discussion of the variant approaches taken to this problem in other jurisdictions, the Ohio Supreme Court concluded that the statute ran from the termination of the physician-patient relationship, stating:

> Although an examination of the cases [footnote omitted] reveals that there is much to recommend the adoption of the discovery rule, we reluctantly conclude that courts of Ohio should not decree such an adoption. We are convinced that to do so would place us in the obvious and untenable position of having not only legislated, but of having done so directly in the face of a clear and opposite legislative intent [citations omitted].

Wyler at 170-71.[2]

---

2. Bendix has conceded that Brush Beryllium Co. v. Meckley, 284 F.2d 797 (6th Cir. 1960), supports the use of the "discovery" rule here. In Brush Beryllium, the plaintiff developed beryliosis as a result of breathing noxious airborne berylium from the defendant's plant. The beryliosis ("a disease of slowly insidious development in the respiratory tract," id. at 797) first manifested itself after the expiration of the two-year statute, but the suit was filed within two years of that first manifestation. The Sixth Circuit affirmed the district court's holding that the statute ran from the time that the effects of the disease manifest themselves.

Defendant points out that Brush does not consider the Ohio precedents of Kerns, supra, and Pomeroy Coal, supra, but rather states, "we find no applicable Ohio law to govern decision of the issue in this case." Brush at 799. Brush adopts the reasoning of Urie v. Thompson, 337 U.S. 163 (1949) (an F.E.L.A. case) in holding that the time of discovery triggers the statute of limitations.

Though the Ohio Supreme Court was aware of both Brush and Urie, as evidenced by n. 3 in Wyler, at 170, it did not adopt the discovery rule enunciated in those cases. Accordingly, the decision in Wyler negates the argument that Brush states the law of Ohio.

Bendix further cites an Ohio Tenth District Court of Appeals decision in support of its reading of the limitations statute. In Spangler v. Southern Mills, (Tenth District Court of Appeals of Ohio, Feb. 2, 1978), the appeals court affirmed the trial court's dismissal of an asbestosis case based upon the expiration of the two-year statute of limitations. The appeals court refused the appellant's invitation to adopt the discovery rule for cases of peneumonoconiosis through reliance on the Ohio Supreme Court decision in Melnyk v. Cleveland Clinic, 32 Ohio St. 2d 198 (1972) which adopted the discovery rule for cases of medical malpractice where a physician negligently leaves a "foreign object" in a surgical patient. On May 11, 1978, the Ohio Supreme Court overruled a motion to certify the record in Spangler.

Mrs. Clutter argues that the Ohio Supreme Court has not ruled on the question of when the Ohio statute of limitations starts to run for asbestosis cases. Plaintiff points out that the lack of a specific ruling from that court leaves this district court free to declare the law of Ohio as it would be declared by the Ohio Supreme Court. Plaintiff argues that this district court is not required to follow any Ohio lower court decisions (specifically Spangler, supra) if it is "convinced that the highest state court would decide differently." Ruth v. Bituminous Casualty Corp., 427 F.2d 290, 292 (6th Cir. 1970).

Mrs. Clutter argues that:

> [I]t is totally unreasonable to expect Mr. Clutter to have commenced his cause of action in 1966, two years after date of last employment and exposure to asbestos, where, as stated above, it was not until August, 1977 that a firm diagnosis of asbestos-related malignant pleural mesothelioma was conclusively made.

Plaintiff has cited numerous decisions of jurisdictions that have adopted the more humane discovery rule rather than the date-of-the-injury rule. Of these cases, Justice Rutledge's opinion for the court in Urie v. Thompson, supra, which adopts the discovery rule for Federal Employer's Liability Act claims, best articulates the plight of the plaintiff suffering a latent disease in a "non-discovery" jurisdiction.

> If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

Id. at 169.

Plaintiff argues that Melnyk v. Cleveland Clinic, supra, indicates that the Ohio Supreme Court would here hold that the statutory period is tolled until the discovery of pleural mesothelioma. Relying on the fact that foreign

object claims are not susceptible to the proof problems that are normally associated with "stale" claims,[3] the Ohio Supreme Court created "an exception to the general rule in cases such as the one at bar." Id. at 202. The exception is expressly for foreign object cases and was premised on the societal problems and pressures "associated with modern surgeon-patient relationships." Melnyk, at 202. Moreover, Melnyk does not overrule Wyler:

> We need not disturb the holding in Wyler, nor interfere in the affairs of our sister branch of government, in order to accord this rule of law the viability we have determined it must have.

Melnyk, at 201. Hence Melnyk cannot be read as broadly as urged by plaintiff.

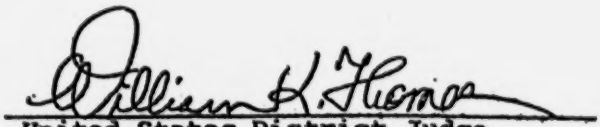
Acknowledging that the discovery rule has been widely adopted in jurisdictions other than Ohio, this federal court cannot hold that the Ohio Supreme Court would adopt that rule for asbestosis cases. In Wyler the court expressly refused to change Ohio's date-of-the-injury rule in the face of the Ohio legislature's failure to do so. Only for this reason does this district court determine that the Ohio Supreme Court would not adopt the discovery rule for asbestosis cases.

---

3. Unlike a foreign object claim where the forceps and sponge are tangible and unlikely to have been taken into the plaintiff by other means, there are proof problems in an asbestosis case as to whose products at what time were ingested by the plaintiff.

Defendant Bendix's motion for summary judgment on the survival claims on the ground that the statute of limitations of O.R.C. §2305.10 has not been complied with is hereby granted. Summary judgment in favor of the other defendants on the same ground is granted sua sponte on the survival claims.

IT IS SO ORDERED.



United States District Judge

FILED
SEP 22 1980
MICHAEL RODAK, JR., CLERK

No. 80-308

IN THE

Supreme Court of the United States

October Term, 1980

ORTHO PHARMACEUTICAL CORPORATION,
Petitioner,
v.
SONDRA L. McKENNA and
JAMES R. McKENNA,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN E. EVANS, JR.
EVANS, IVORY & EVANS
711 Frick Building
Pittsburgh, Pennsylvania 15219
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Counsel for Respondents

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

THE QUESTION PRESENTED FOR REVIEW

In this personal injury action should this Court issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, in order to review that Court's interpretation of Ohio law relating to the application of that state's statute of limitations? [Ohio Rev. Code Ann., §2305.10 (p. 1954)]

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SUPPLEMENTAL STATEMENT OF THE CASE

This personal injury action was instituted by the Respondents McKenna in the Court of Common Pleas of Allegheny County, Pennsylvania. It was removed by Petitioner, Ortho Pharmaceutical Corporation, to the District Court of the United States for the Western District of Pennsylvania, pursuant to 28 U.S.C. §1441(b).

Ortho petitioned the District Court to transfer the action to the Federal Court in Ohio. The equities for retaining the suit in Pennsylvania favored plaintiffs and the transfer motion was refused by the Federal Court in an Order dated February 27, 1975.

Mrs. McKenna, at the age of 27 years, acted under the direction of a physician (Dr. Sanford Press) and began taking Ortho's oral contraceptive drug, "Ortho-Novum," in January 1965. Respondents were assured by a brochure published by Ortho that the drug involved no risk of serious side effects. (56a) In reliance upon this written assurance, Mrs. McKenna continued to use the drug for four and one-half years, until July 1969. (125a) In 1967 she developed severe headaches; thereafter she had two attacks of transient ischemia; and hypertension developed in June 1969. (84a) Dr. Press assured her that the Ortho-Novum was not causing the symptoms. On March 2, 1972, the contraceptive drug taken by Mrs. McKenna caused her to suffer a catastrophic stroke which has left her permanently and totally disabled. (192a-183a)

Respondents neither knew, nor could they reasonably have known, until after the stroke, that the adverse effects suffered by Mrs. McKenna were related to the "pill."

This product liability action was filed on November 28, 1973, one year and nine months after the stroke,

which was approximately four years after the hypertension had been manifested.

At the close of the trial, the District Court directed a verdict in favor of Ortho on the ground that suit was not brought within two years after June 1969 and, therefore, the actions were barred by the Ohio statute of limitations.

The Third Circuit reversed the lower court (March 18, 1980) and declared that the Supreme Court of Ohio, in applying the law of that state, would toll the operation of the statute until Respondents knew, or reasonably could have known, that Mrs. McKenna's adverse reactions and stroke were caused by the Ortho-Novum. One judge dissented on the ground that Ohio would apply the "unenlightened" and "archaic" rule whereby the McKennas' claim would be barred before they had knowledge of its existence. (Petition, pp. a20, a29)

On March 13, 1980, the Ohio Legislature enacted a statute wherein it assured the victims of chromium and asbestos poisoning that their causes of action would arise on the date when they were informed, or upon the date when they reasonably should have known, that they were suffering from the disease. Thereupon, Ortho petioned the Third Circuit for rehearing on the ground that under the amendment to the limitation statute an application of the doctrine of *expressio unius est exclusio alterius* barred Respondents' claims. It argued that the Legislature preserved only actions due to asbestos and chromium from operation of the statute of limitations where the victim was ignorant of his cause of action. Therefore, *all other* trespass actions of any kind were barred two years after the occurrence, even though

the victim had no knowledge of his cause of action. It based this argument on the legal maxim *expressio unius est exclusio alterius*. On June 17, 1980 the Third Circuit refused the rehearing petition, after having considered further briefs from both parties.

SUMMARY OF RESPONDENTS' ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

There is no valid basis for Petitioner's request that this Court issue a Writ of Certiorari. Its request does not fall within the character of reasons for the issuance of such writ as the same are set forth in Rule 17 of this Court. Ortho's sole complaint is that the Third Circuit did not correctly determine the law of Ohio with reference to its applicable statute of limitations.

No conflict between decisions of different courts of appeal is involved. There is no question of the construction of any Act of Congress. No state statute has been declared unconstitutional. On the precise issue involved the Ohio Supreme Court has not rendered a decision; but in an analogous case the Court has declared that the "discovery" rule applies and that the statute of limitations is tolled until the injured party knows, or reasonably should know, of its existence.

Lower court decisions are not controlling in determining the law of the state of Ohio on the subject.

A recent amendment to Ohio's statute of limitations protects victims of chromium and asbestos disease from operation of the statute while they have no knowledge of their cause of action. This amendment neither by reference nor inference deprives other injured parties of the right to a tolling of the statute of limitations in their cases.

REASONS FOR DENYING A WRIT OF CERTIORARI

The Supreme Court of Ohio has decided numerous cases in which it interpreted the Ohio statute of limitations, but there was no decision of that Court which was in point in the present case. It, accordingly, became the duty of the Third Circuit to determine the Ohio law as it would apply in this case. Ortho objects to the Circuit's interpretation. The sole issue before this tribunal is: Did the Third Circuit properly interpret Ohio law when it declared that the Supreme Court would toll the running of the statute of limitations until Respondents knew, or reasonably should have known, of their causes of action?

If this Court were to review all cases decided by the Circuits, wherein this type of narrow non-federal issue exists, it would be so overwhelmed that it could not function. In its Rule 17, this Court suggests the character of reasons for which it may issue writs of certiorari. The present case does not fall within the restricted area of that group. The question involved is not federal law, but only the application of state law in a diversity case; no act of Congress is under consideration; and the Circuit has not departed from the accepted course of judicial proceedings.

The injury for which the plaintiffs brought suit was a stroke brought on by defendant's oral contraceptive drug. Their action for such was filed within the two year statute of limitations. The Third Circuit ruled that even if the cause of action was held to arise when the drug produced the early symptom of hypertension, more than two years prior to suit, the operation of the statute was

tolled until plaintiffs knew, or reasonably should have known, of their causes of action.

There are strong reasons to support the Circuit's interpretation of Ohio law. In determining when the statutory period will commence, there are a number of significant decisions of the state and federal courts in Ohio and, it was not necessary to rely upon lower court opinions as Ortho urges.

In a line of medical malpractice cases, the Supreme Court has ruled that the statutory period would not operate in Ohio from the date of the physicians' wrong (the "traditional" rule); but to meet the ends of justice the two-year period would not begin until the physician-patient relationship has terminated.[1]

A significant indication of the direction in which Ohio's Supreme Court is moving, in an effort to protect injured parties from the harsh "traditional" rule, is the decision in 1972 in *Melnyk v. Cleveland Clinic,* 32 Ohio State 2d 198, 290 N.E. 916. This was a malpractice action in which a foreign object had been left by the defendant in the patient's abdomen. Sometime after the elapse of the two year limitation period, the patient discovered the cause of his pain and disability. A unanimous court espoused the "discovery" rule and held that the two-year statute was tolled until the victim knew,

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1. *Bowers v. Santee* (1919), 99 Ohio State 361, 124 N.E. 238

Ishler v. Miller (1978), 56 Ohio State 2d 447, 384 N.E. 2d 296

Gillette v. Tucker (1902), 67 Ohio State 106, 65 N.E. 865

DeLong v. Campbell (1952), 157 Ohio State 22, 104 N.E. 2d 177

or reasonably should have known, of his tortious injury. This decision is particularly significant since a divided Court (four to three) had ruled in 1971, in the case of *Wyler v. Tripi,* 25 Ohio State 2d 164, 267 N.E. 2d 419, that as against the plaintiff in a medical malpractice action the Court would not apply the statute of limitations from the date of injury. Its operation would begin when the physician-patient relationship terminated. However, the Court refused to apply the more liberal "discovery" rule under which the statute would operate from the date of the victim's discovery of his cause of action. In 1972, the Ohio Supreme Court, in *Melnyk,* refused to follow *Wyler* but, instead, ruled that in this foreign object malpractice action the statute of limitations was tolled until the plaintiff-patient learned of his right of action.

Cases in other jurisdictions have analogized the "foreign object" malpractice actions with those product liability suits where deleterious drugs were ingested by the victim. The operation of the statute of limitations was similarly limited to protect the plaintiff. [*Raymond v. Eli Lilly and Co.,* 412 F. Supp. 1392 (D.N.H. 1976); *Gilbert v. Jones,* ..... Tenn. ....., 523 S.W. 2d 211 (Ct. of Appeals of Tenn., Western Sec. 1974; certiorari denied by Supreme Court 1975)]

A frequently cited Ohio case decided in 1960 by the Sixth Circuit Court of Appeals is *Brush Beryllium Co. v. Meckley,* 284 F.2d 797. Plaintiff had contracted the disease of berylliosis as a result of defendant's negligence, but was not aware of the same until the two-year statutory period had expired. The Court of Appeals ruled that the Ohio limitations statute did not operate until the disease manifested itself and was diagnosed

as such. It held that the plaintiff's cause of action did not accrue until after the two year period had elapsed and, hence, the plaintiff was not barred. This case was cited and followed in *Stewart v. Sachs,* 55 00 (2d) 271, 273 (1971).

In its movement toward consumer protection in product liability cases, the Supreme Court of Ohio, in 1977, for the first time, adopted the law of strict liability, as such is set forth in Section 402A of the Restatement, Second, Law of Torts, in the case of *Temple v. Wean United, Inc.,* 50 Ohio State 2d 317, 364 N.W. 2d 267.

In a further development of this trend, the Court of Appeals of Hamilton County decided the case of *Seley v. G. D. Searle & Co.,* 15 Ohio Opinions 3d Series, January 1980. The Court ruled that a manufacturer of contraceptive pills, which distributes promotional literature about its product directly to patients, has a duty to warn the prospective patients directly of any hazard in the drug and not merely the prescribing physician.

Ortho argues that the Third Circuit was bound to follow several lower court Ohio cases, which did not protect the injured party against the statute of limitations barring a claim even before the victim knew, or could have known, that he had a cause of action. These decisions were not binding on the Circuit Court.

Respondents submit that the Ohio Supreme Court decisions are controlling. It was stated in *Western Pennsylvania National Bank v. American Insurance Co. of Newark, N. J.,* 428 F.2d 1220 (3rd Cir. 1970):

> "In a diversity action we are governed by the state substantive law as pronounced by the state's high-

est court. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)."

In support of its complaint that the Third Circuit did not follow the lower court Ohio decisions, the Petitioner cited *Commissioner v. Estate of Bosch,* 387 U.S. 456; 87 Supreme Court 1776 (1967). While this tribunal said that federal courts should attribute some weight to non-binding lower state court decisions, it also said:

> "And (citation) this Court further held that 'an intermediate appellate state court * * * is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.*" (p. 465) (Emphasis Supplied)

Baughman v. Bolinger, M.D. (1980), 485 F. Supp. 1000, (D. C. S. D. Ohio), is a significant recent Ohio federal court case interpreting Ohio personal injury statute of limitation law and the *Melnyk* case. The husband plaintiff had been injured through medical malpractice. The question arose as to whether the wife's action for loss of consortium arose at the time of the husband's injury or at a much later date when he discovered it. Based on the federal court's interpretation of *Melnyk,* it ruled that the period of limitations operated from the date of discovery of the defendant Dr. Bolinger's wrongdoing. The District Court noted that the foreign object distinction and the "discovery" exception are based on "the sound public policy deriving from the absolute dependence of a patient upon his physician during surgery." (p. 1003) Likewise, as in the present case, the user of a drug is wholly dependent upon the company which manufactures, sells, tests that

drug for harmful side effects, and advertises that it is safe and free from any serious adverse reactions.

- a -

The Amendment to the Ohio Limitations Statute

At about the time the Circuit Court decided this case, the Ohio Legislature amended the statute of limitations. (See Ortho's Petition, p. 2) It assured persons who had claims arising out of exposure to asbestos or chromium that their actions would not be barred before they had knowledge of their claims.

Shortly following the amendment, Ortho petitioned the Circuit Court for a rehearing. It urged that since the legislature had preserved only asbestos and chromium claims, by assuring that the "discovery" rule would delay the application of the limitations period, that this protection was thereby eliminated from all other personal injury actions. It asserted the maxim of *expressio unius est exclusio alterius.*

An answer to this contention is that if the Legislature had intended such a drastic change in Ohio law, it could readily have said so. It did not.

Another answer is that the doctrine of *expressio unius est exclusio alterius* has limited application in Ohio. It is provided in 50 Ohio Jurisprudence 189 (relied upon by Ortho) that this maxim is "not of universal application and caution should be exercised in its use."

Finally, the interpretation of the amendment urged by Petitioner is that it determines in all cases that the cause of action *accrues* as of the date of injury. However, the legal theory adopted by the Third Circuit in the present case is the one that was invoked by the Ohio

Supreme Court in *Melnyk,* namely, that the application of the statute of limitations is *tolled* in Ohio until the victim knows, or reasonably should have known, of her cause of action.

In its second Opinion in this case, the Circuit Court decided that when the Ohio Legislature amended the limitations statute to protect the victims of two diseases from the inequitable result of having their actions barred before they could know of or exercise their rights, that it did not thereby intend to deprive every other citizen of Ohio of the "discovery" right in trespass actions. Such a conclusion was neither explicit nor implicit in the amendment.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

CONCLUSION

The single issue decided by the Third Circuit Court of Appeals, namely, whether the Supreme Court of Ohio would toll its statute of limitations under the circumstances of this drug case, is not one that merits a review by the Supreme Court of the United States. The issue in this case is clearly outside the ambit of Rule 17 of this Court, which sets forth the type of questions that merit the issuance of writs of certiorari to Circuit Courts.

From the two Opinions which the Third Circuit wrote in this case, it is evident that a scholarly study was made of relevant decisions of the Ohio Supreme Court, as well as of other pertinent authorities.

In reaching its decision, the Circuit Court made an assumption that favored Ortho, namely, that the date of injury was the time that Mrs. McKenna developed hypertension. Respondents contended the occurrence of the stroke was the date of injury. Irrespective of when the injury occurred, the statute of limitations was tolled until Respondents knew, or reasonably could have known, of the cause of Mrs. McKenna's condition.

Respectfully submitted,

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